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In the Supreme Court of the United States

OCTOBER TERM, 1974

UNITED STATES OF AMERICA

v.

DAVID EMERY SERFASS, PETITIONER

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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No.

UNITED STATES OF AMERICA

v.

DAVID EMERY SERFASS, PETITIONER

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

DAVID EMERY SERFASS, petitions for a Writ of Certiorari to review the Judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The Opinion of the Court of Appeals (Appendix "A", infra, pages 15-18) is not yet reported. The Opinion of the District Court (Appendix "C", infra, pages 20-43) was not reported.

JURISDICTION

The Judgment of the Court of Appeals (Appendix "B", infra, page 19) was entered on February 20, 1974. The jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

1. Whether under the Criminal Appeals Act (18 U.S.C. 3731), which provides that the United States may appeal to the

court of appeals from a decision of a district court dismissing an indictment "except that no Appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution," an Appeal by the United States is barred by the prior jeopardy when the district court grants a Pre-trial Motion to Dismiss, relying on facts outside the indictment, the district court relying on facts derived from the defendant's affidavit in support of his Motion, his Selective Service File, and from Stipulations of Counsel at oral argument on the Motion to Dismiss?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> ". . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; . . ."

The Criminal Appeals Act, 18 U.S.C. 3731, as amended, 84 Stat. 1890, provides:

> "In a criminal case an appeal by the United States shall lie to a Court of Appeals from a decision, judgement, or order of a district court dismissing an indictment or information as to any one or more counts, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution.
>
> "An appeal by the United States shall lie to a Court of Appeals from a decision or order of a district court's suppressing or excluding evidence or requiring the return of seized property in a criminal proceeding, not made after defendant has been put in jeopardy and before the verdict or finding of an indictment or information, if the United States Attorney certifies to the district court that appeal is not taken for purpose of delay and that the evidence is a substantial proof of a fact material in the proceeding.
>
> "The appeal in all such cases shall be taken within thirty days after the decision, judgment or order has been rendered and shall be diligently prosecuted.
>
> "Pending the prosecution and determination of the appeal in the foregoing instances, the defendant shall be released in accordance with Chapter 207 of this title.
>
> "The provisions of this Section shall be liberally construed to effectuate its purposes."

STATEMENT

Your Petitioner had been ordered for induction into the armed forces of the United States on December 18, 1970. The induction was to have taken place on January 18, 1971. On December 29, 1970, your Petitioner requested a special form for conscientious objectors (Form SSS–150). (Selective Service File, pages 74, 75.) His local board, Local Board No. 89, then received the completed Form 150 from the Petitioner, who requested a courtesy interview on January 11, 1971, and received such on January 13, 1971. (Selective Service File, pages 77, 78–97.) The local board considered his entire file at a meeting on January 13, 1971, and on January 14, 1971, your Petitioner was informed that the Board unanimously agreed "that there was no change over which the [Petitioner] had no control." On this basis, the board decided not to re-open his file. (Selective Service File, 103.) The Petitioner then refused induction at the examining station in Wilkes-Barre, Pennsylvania, on January 18, 1971. (Selective Service File, 118.) Your Petitioner was thereafter indicted and arraigned, the indictment being for a violation of 50 U.S.C. App. 462(a). At the arraignment, the Petitioner pleaded "not guilty" and the trial date was set for January 9, 1973. Subsequent to this, a Motion to Postpone the Trial was filed and granted. At the same time, a Motion to Dismiss the Indictment was also filed. The Briefs of the Government and your Petitioner were submitted and argument on the Motion to Dismiss was held before Judge Michael Sheridan, Chief Judge, United State District Court for the Middle District of Pennsylvania.

In an Opinion filed July 16, 1973, Judge Sheridan granted the Petitioner's Motion to Dismiss the Indictment. The Court held that the statement of reasons was sufficiently ambiguous to be reasonably construed as a rejection on the merits which would prejudice the Petitioner's right to in-service review and, therefore, granted the Motion to Dismiss.

The United States filed a Motion of Appeal to the Court of Appeals seeking a review of the district court's order dismissing the indictment. The Government in its Brief contended jurisdiction on the basis of 18 U.S.C. 3731. Your Petitioner's Brief contended that the order of the district court dismissing the indictment was not an appealable order and that the Circuit Court of Appeals, therefore, did not have jurisdiction to hear the appeal as your Petitioner would then be put twice in jeopardy. The Court of Appeals held that under Section 3731 jeopardy had not yet attached and, therefore, dismissal of the indictment in the instant case was an appealable order, and went on to decide the merits of the Government's appeal, and basing its decision on *Musser v. United States*, 42 U.S.L.W. 3286 (U.S., November 13, 1973), decided that since the cases of *United States v. Shomock*, 462 F. 2d 338 (3rd Cir., 1972), *United States v. Ziskowski*, 465 F. 2d 480 (3rd Cir., 1972, and *United States v. Folino*, No. 72–1974 (3rd Cir. June 29, 1973), among others relied upon by your Petitioner were overruled and that, therefore, the "no man's land" discussed in *Ehlert v. United States*, 1971, 402 U.S. 99, 103–04 & n. 7, 107, did not exist, your Petitioner would have had the chance for in-service review of his conscientious objector request and was not denied due process of law.

In reaching the result that the order of the district court dismissing the indictment was an appealable order, the court relied on *United States v. Pecora*, 484 F. 2d 1289 (3rd Cir., 1973) which held appealable a district court's pre-trial dismissal of an indictment based upon a stipulation of facts upon which

the indictment was returned. The court placed heavy emphasis on the fact that the Petitioner had not waived his right to a jury trial pursuant to Rule 23(a) of the Federal Rules of Criminal Procedure and that even though your Petitioner –

> ". . . had established a defense as a matter of law, rather than upon the finding, as in *Pecora* that there were insufficient facts as a matter of law to support any conviction, we see no significant constitutional difference between the two situations. Both involved a determination as to the legal sufficiency of certain facts, and in either case, denial of the Motion to Dismiss entitled the defendant to the jury trial which he has not waived. We therefore hold that jeopardy did not attach and the dismissal of the indictment in the instant case was an appealable order."

Citing *United States v. Martin Linen Supply*, 485 F. 2d 1143 (5th Cir., 1973), *United States v. Brown*, 481 F. 2d 1035 (8th Cir., 1973).

The notation is also made in the footnotes that contrary decisions stand in other circuits, namely, *United States v. Southern Railway Company*, 485 F. 2d 309 (4th Cir., 1973); *United States v. Rothfelder*, 474 F. 2d 606 (6th Cir.), *cert. denied*, 413 U.S. 922 (1973); *United States v. McCreery*, 473 F. 2d, 1381 (7th Cir., 1973).

REASONS FOR GRANTING THE WRIT

This case raises very important issues on the meaning of the double jeopardy clause of the United States Constitution and the statutory construction of a recently amended Criminal Appeals Act, 18 U.S.C. 3731. The construction of this statutory section, as applied by the Third Circuit Court of Appeals in this case, has put the defendant, your Petitioner, in jeopardy in violation of the clear import of the statute itself and the United States Constitution.

Title 18, U.S.C. 3731 provides in pertinent part:

"In a criminal case, an appeal by the United States

> shall lie to a Court of Appeals from a decision, judgment or order of a district court dismissing an indictment or information as to any one or more counts, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution . . .".

The question presented as to whether or not the Circuit Court of Appeals had jurisdiction to hear an appeal by the Government from the dismissal of an indictment was faced by the United States Court of Appeals, First Circuit, in *United States v. Findley*, 439 F. 2d 970 (1st Cir., 1971). In that case the defendant, under a 1–A classification by the Selective Service System, was ordered to report for induction on June 24, 1969. He completed and returned to his local board the necessary SSS Form 150, seeking to be classified as a conscientious objector on June 2, 1969. The board, after consideration of his claim, wrote to him as follows:

> "This letter is to advise that your case was considered by the board at a meeting held June 24, 1969. The board did not re-open your classification."

On the date of induction, which was then scheduled for August 26, 1969, the defendant reported but refused to submit. He was indicted under 50 U.S.C. App. Section 462. He filed a Motion to Dismiss the Indictment on the ground that the board did not give him any reasons for its refusal to re-open his classification. At hearing on the Motion to Dismiss the Government stipulated that the defendant's case was a post order to report situation and, also, that the board had given no reason for its refusal to reopen. The district court found in favor of the defendant and granted his Motion to Dismiss. The Government appealed under 18 U.S.C. Section 3731.

The Court of Appeals in considering the question of jurisdiction examined Section 3731, paragraph 6 authorizing appeal to the Court of Appeals, which then read as follows:

> "From a decision or judgment, setting aside or dismissing any indictment or information, or any count thereof, except where a direct appeal to the Supreme Court of the United States is provided by this section."

In citing *United States v. Apex Distributing Company*, 270 F. 2d, 747, (9th Cir., 1959), that court stated that that section authorized appeals only from those dismissals based upon defects in the indictment or information or in the institution of the prosecution. The court then stated,

> "We believe this limitation properly reflects the statutory purpose, at least to this extent: that if a dismissal is a result of the showing of evidentiary facts, dehors the indictment, which, if established at a trial would constitute a defense on the merits, the court's ruling, however described . . . is, in effect an acquittal . . . and thus, not within the attended purpose of the appeal statute. *Findley*, did present a defense on the merits (the invalidity of the induction order due to improper classification), based on such independent facts." (*Findley*, *supra*, at 972.)

The court further supports its judgment by stating that if the defendant had waited until trial to set forth and approve the facts as presented in the hearing on the Motion to Dismiss, he would have, assuming a correct view of the law by the court been entitled to an acquittal from which no appeal would lie. This conclusion is arrived at even though the court explicitly stated that Findley had not formally been put in jeopardy and even though the parties had stipulated to additional facts and questions. In citing *United States v. Sisson*, 399 U.S. 267, 90 S. Ct. 2117, 26 L. Ed. 2d 608 (1970), in which the basic ground rules for the exclusion of appeals was stated as being where the decision of the court was based on the merits, the court concluded as follows:

> "If an appeal will lie in the present case, while it cannot if the defendant waits and subjects himself to jeopardy, informed counsel believing they have a defense on the merits will henceforth protect their

> clients by avoiding and expediting procedure otherwise beneficial to all concerned, and only ignorant and ill-advised defendants will subject their defense on the merits to a Government appeal. We will not adopt such a penalizing construction of the statute."

With this conclusion, the appeal was dismissed for want of jurisdiction.

United States v. Ponto, 454 F. 2d, 647 (7th Cir., 1971), decided the identical jurisdictional question. That case also involved a Selective Service violation under 50 U.S.C. App. Section 462, a Motion to Dismiss the Indictment and a district court granting the defendant's motion. The Government appealed under 18 U.S.C. Section 3731. The Court held that in a case where the district court granted a registrant's motion for a dismissal of the indictment and a prosecution for failure to submit to induction and it made no reference at all to the wording or form of the indictment itself or to the manner in which the grand jury considered the original indictment, and where the arguments on the hearing on the motion to dismiss were related to the local board's procedures with reference to the processing of registrant's claim, and where the district court rules that the local board had erroneously refused to reopen the registrant's classification, the granting of the registrant's motion for dismissal of the indictment was not based upon a defect in the indictment or in the institution of the prosecution but rather on the merits and, therefore, appeal by the Government was precluded. In a companion case of *United States v. Grochowski*, 454 F. 2d 655 (7th Cir., 1971), the court reached the same conclusion. Here, as in *Ponto, supra*, the argument was made that in the alternative the decision of the district court was available to the Supreme Court under the "motion in bar" provision of the Criminal Appeals Act under 18 U.S.C., Section 3731 as it then existed. The court then held that the dismissal of the indictment was not a "motion in bar" because of the fact that the defendant did not confess to the crime and claim

immunity but to the contrary argued that he was not guilty of having committed a crime. Here the court cites *United States v. Weller*, 401 U.S. 254, 91 S. Ct., 602, 28 L. Ed. 2d 26 (1971). In addition, the court followed its holding in *Ponto, supra*, and ruled that the appeal from the district court, which had granted the defendant's Motion to Dismiss the Indictment, should be dismissed for want of jurisdiction.

Both the cases then were reheard by the court en banc, and a more particular, involved legislative and statutory history with reference to the appealability of criminal cases by the Government was looked into. The court stated,

> "Thus, the Government, under the 1948 legislation, could appeal under paragraph 6 from dismissals of indictments under Rule 12 which would have been cognizable in legal basis as orders responsive to demurrers or pleas in abatement at common law. And, as indicated earlier, these common law pleas were limited to objections to the wording in the indictment or to the proceedings culminating in the issuance of the indictment." *Ponto, supra.* at 6060.

In responding to the question as to whether or not the court should interpret paragraphs of the former Section 3731 according to the plain meaning of the words in the provision as proposed by the government, the court answered and cited *Carroll v. United States*, 354 U.S. 394, 399, 77 S. Ct. 1332, 1336, 1 L. Ed. 2d 1442 (1957),

> "It is axiomatic, as a matter of history as well as doctrine, that the existence of appellate jurisdiction in a specific federal court over a given type of case is dependent upon authority expressly conferred by statute. And since the jurisdictional statute prevailing at any given time is so much a product of the whole history of both growth and limitation of federal court jurisdiction since the first judiciary act, 1 Stat. 73, they have always been interpreted in light of that history and in the axiom that clear statutory mandates must exist to found jurisdiction."

Another interpretation of paragraph 6 of the former Section 3731, urged by the Government was that the court should examine the effect of a dismissal order rather than the reason for its entry. The court states, in answer to that proposal, that such interpretation would include almost all dismissals prior to trial. The court then goes on to state that they did not believe such a broad reading was intended by Congress. Further, the court makes it clear that it believes that such a broad reading of the words in Section 3731 would violate the long-standing principle that the act should be strictly construed against the Government's right to appeal. Citing *United States v. Sisson*, 399 U.S. 267, 270, 286, 291, 90 S. Ct. 2117, 26 L. Ed. 2d, 608 (1970); *Carroll, supra*, at 394, 400, 406; *United States v. Borden Co.*, 308 U.S. 188, 192, 60 S. Ct. 182, 84 L. Ed. 181 (1939). The court then goes on to affirm that,

> "An objection to the local board's classification of a registrant can be raised as a defense to a prosecution under 50 U.S.C. App. Section 462. The Selective Service Act, 50 U.S.C. App. Section 460(b)(3) provides that all questions relating to judicial review of the classification and processing by a board be reviewed in this manner. The motion in the instant case presented questions concerning *Ponto's* classification, which are raised only by defense. This decision to dismiss by the district judge was based on questions presented by his defense. As such, it was a ruling on the merits on the defense." *Ponto, supra*, at 663.

In addition, the court goes on to assert that the defense raised by the motion in the district court could well have been decided at trial. However, it points out that a defense on the merits can just as well be decided prior to trial. It goes on to state that Rule 12(b)(1) of the Federal Rules of Civil Procedure clearly allows a party to present a Motion to Dismiss prior to trial based on a defense "which is capable of determination without trial of the general issue . . .", the court then found that the Motion to Dismiss as ruled upon by the district court fits into

that category. The court states, in conclusion, that the dismissal order was a determination on the merits and, as such, was an acquittal to which jeopardy attached.

> "Thus, Government appeals from this ruling would violate the double jeopardy clause of the Fifth Amendment since a retrial on the charge would be prohibited."

For these reasons, the court dismissed the appeal for lack of jurisdiction.

In reconsidering *Grochowski, supra*, the same conclusion was reached. And, in a case heard on the same dates as the decision on rehearing of *Ponto* and *Grochowski*, namely *United States v. Gustavson*, 454 F. 2d 677 (7th Cir., 1971), a case in which the defendant was indicted for refusal to submit to induction and prior to trial the district court granted the defense counsel's Motion to Dismiss the Indictment the Government appeal to the Court of Appeals was dismissed for lack of jurisdiction.

In the *United States v. Weller*, 466 F. 2d 1279 (9th Cir., 1972), the identical question was reviewed and decided. Here, again, the indictment for refusal to submit to induction was dismissed. The court affirmed that the decision to dismiss by the district court was not based upon any defect in the indictment or in the institution of the prosecution, but rather was based solely upon the validity of a Selective Service regulation barring the appearance of counsel before a local board. It further stated that the issue which was raised was in the nature of a defense to the crime charged and because of this, the Court of Appeals did not have jurisdiction to hear and determine the appeal under 18 U.S.C.A. Section 3731, especially in light of interpreting the statute with an eye to its legislative history. These cases cited above relate to interpretations of the statute before the amended statute which would be applicable in this case. However, many of the circuits have interpreted the question at hand in this case with the history of the statute in mind and the decisions under the prior section of the Criminal Appeals Act serve great aid in guiding decisions based on the

new statute. At any rate, even given the fact that the prior holdings relating to the statute as it formerly existed should be used as a guideline in determining the meaning of the statute, there is a clear conflict in the decisions by different circuit courts of appeal on this issue. In the *United States v. Rothfelder*, 474 F. 2d 606 (6th Cir., No. 72–1473, Supreme Court, cert. denied, 1973), the Sixth Circuit also followed the holdings in *Findley, supra, Ponto, supra,* and *Weller, supra,* in holding that where the district court in dismissing the indictment considered evidence in the registrant's Selective Service File, the judgment of the district court in dismissing the indictment was, in effect, an acquittal and the Government did not have a right to appeal under 18 U.S.C.A., Section 3731. In *United States v. Velazquez*, 482 F. 2d 139 (2nd Cir., 1973) 18 U.S.C.A. Section 3731 was reviewed and decided. Although we feel there are distinguishing factors in that case which would separate it from the case at hand, the court determined that it had jurisdiction to review the dismissal of the indictment. In *United States v. Pecora*, 484 F. 2d 1289 (3rd Cir., 1973), the case relied upon by the Third Circuit Court of Appeals in our case to determine that there was jurisdiction to hear the appeal, the court concluded that in that case where jeopardy had not attached at the time of the pre-trial dismissal of the indictment, the Government could appeal the dismissal. The distinguishing feature in that case centers around a point set forth in the notes of the Court of Appeals' decision in this case. The court recognized that there might be a distinction between the decision in *United States v. Hill*, 473 F. 2d 759 (9th Cir., 1972) and *Pecora*. The court states that it did not feel that this distinction made the instant order appealable but did state that to the extent that *Pecora* and *Hill* might be inconsistent, the court found itself bound by *Pecora*.

The most telling question to be analyzed is the effect of the change in the section in the subsequent effect of prior decisions

based on the old section in helping us to determine the appealability of certain matters under the new. The amendment of the Criminal Appeals Act section at hand became effective on January 2, 1971 and it would clearly apply to the case at bar. The argument was made in *United States v. McCreery*, 473 F. 2d 1381 (7th Cir., 1973) that the decisions based upon interpretations of the prior statute cannot aid questions arising under the new amendment. The court in response to this position stated as follows:

> "The Government does not contend this case is factually distinguishable from *Ponto*. It correctly points out that *Ponto* arose prior to the amendment of the Criminal Appeals Act which became effective on January 2, 1971, whereas the amended statute is applicable to this appeal. See 84 Stat. 1880, 1890. But our decision in *Ponto* rested on two independent grounds, one statutory and one constitutional. Assuming, *arguendo* that the statutory analysis is not applicable to the amended act, it is nevertheless perfectly clear that the constitutional analysis in *Ponto* compelled the conclusion that the order of April 20, 1972 was an acquittal from which the government may not appeal . . . The Government's arguments to the contrary merely restate the reasoning of the dissenting opinion in *Ponto* which was squarely rejected by the en banc majority. See 454 F. 2d at 667."

In summary, the dismissal of the indictment here was based on the merits and it is clear that jeopardy had attached. The Court of Appeals erred in concluding to the contrary.

There is a clear conflict among the courts of appeal regarding the construction and effect given to this section of the Criminal Appeals Act. As set forth above, the Sixth, Seventh, Ninth and under *United States v. King*, No. 72–2213, decided March 21, 1973 (C.A. 4) Fourth Circuits disagree with the decisions rendered under jurisdiction of the Second and Third Circuits in *Velazquez, supra,* and this case upon which the Third Circuit

relied on its earlier decision in *Pecora, supra,* in deciding the jurisdictional question. It is clear that final guidelines should be given as to interpretation to be given to the Criminal Appeals Act,

> "Otherwise the courts and authorities must [continue to] expend energy, not on the merits of dispute settlement, but simply on deciding whether a court has the power to hear a case." *United States v. Sisson,* 399 U.S. 267, 307.

CONCLUSION

For the reasons stated, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted.

Harry A. Dower
Boyd G. Hixson
Barry N. Mosebach

APPENDIX A

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

No. 15229 Cr.

UNITED STATES OF AMERICA

v.

DAVID EMERY SERFASS

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UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

No. 15229 Cr.

UNITED STATES OF AMERICA

v.

DAVID EMERY SERFASS

MEMORANDUM

David Emery Serfass is accused of having violated 50 U.S.C. App. Section 462 by wilfully and knowingly failing to comply with an order of his Local Board to submit to induction into the Armed Forces of the United States. He has filed a motion to dismiss the indictment, contending that he was denied due process of law when the Board inadequately set forth its reasons for denying a post-induction-order request to reopen his classification. This defense is properly raised by motion before trial,[1] especially since none of the facts upon which its resolution

[1] *Accord,* United States v. Ponto, 7 Cir. 1971, 454 F. 2d 657, 663, 664 n.10, 665; United States v. Gustavson, 7 Cir. 1971, 454 F. 2d 677, 678 & n.4; United States v. Martinez, W.D. Pa. 1972, 350 F. Supp. 971, 972–73; United States v. England, W.D. Mo. 1971, 348 F. Supp. 851, 853 n.1; United States v. O'Rourke, S.D. N.Y. 1972, 341 F. Supp. 622, 623 & n.1; United States v. Seeley, D.R.I. 1969, 301 F. Supp. 811; *see* United States v. Henry, E.D. La. 1972, 344 F. Supp. 1; United States v. Stewart, N.D. Cal. 1969, 306 F. Supp. 29, *appeal dismissed,* 1970, 396 U.S. 1066; United States v. Haffner, D. Hawaii 1969, 301 F. Supp. 828; *cf.* United States v. Sisson, 1970, 399 U.S. 267, 325 & n.2, 326, 331–32 & n.6, 348 (White, J., with whom Burger, C.J., and Douglas, J., join, dissenting). *Contra,* Unites States v. Shelly, E.D. Pa. 1971, 330 F. Supp. 1214; *see* United States v. Sisson, 1970, 399 U.S. 267, 301 & n.55; United States v. Ramos, 1 Cir. 1969, 413 F. 2d 743, 744 n.1; United States v. Winer, E.D. Pa. 1971, 323 F. Supp. 604; United States v. Fargas, S.D. N.Y. 1967, 267 F. Supp. 452, 455–57. *See also* United States v. Findley, 1 Cir. 1971, 439 F. 2d 970.

depends is in dispute.[2] Fed. R. Crim. P. 12(b)(1). Briefs have been submitted and oral argument made with respect to defendant's motion.

The material facts are derived from defendant's affidavit in support of his motion, from his Selective Service file, and from the admissions of counsel.[3]

On November 16, 1970, Serfass was mailed an order to report for induction on December 1, 1970. Supervening events resulted in a postponement of his scheduled induction date until January 18, 1971. He requested the special form for registrants seeking conscientious objector status on December 29, 1970. The completed form, supplemented by additional material in support of his application, was returned to the Board on January 8, 1971. Simultaneously, he asked that his classification be reopened and that he be granted a courtesy interview. He subsequently appeared before the Board on January 13, 1971.

At oral argument on the motion to dismiss, defense counsel and the Assistant United States Attorney stipulated [4] that the

[2] *See* United States v. Sisson, 1970, 399 U.S. 267, 301–02 & nn. 55, 56; United States v. Knox, 1969, 396 U.S. 77, 83 & n.7; United States v. Covington, 1969, 395 U.S. 57, 60–61; United States v. Fargas, S.D. N.Y. 1967, 267 F. Supp. 452, 455–57.

[3] Although defendant has not waived his right to trial by jury, a defense based upon an alleged procedural defect in the Selective Service classification process is to be determined by the court. Fed. R. Crim. P. 12 (b) (4); United States v. England, W.D. Mo. 1971, 348 F. Supp. 851, 853; United States v. O'Rourke, S.D. N.Y. 1972, 341 F. Supp. 622, 627; *accord,* Cox v. United States, 1947, 332 U.S. 442, 452–53; United States v. Ponto, 7 Cir. 1971, 454 F. 2d 657, 663; United States v. Ramos, 1 Cir. 1969, 413 F. 2d 743, 744 n.1; Martinetto v. United States, 9 Cir. 1968, 391 F. 2d 346; *see* United States v. Martinez, W.D. Pa. 1972, 350 F. Supp. 971, 973; United States v. Seeley, D.R.I. 1969, 301 F. Supp. 811.

[4] A judicial admission need not be in writing if made in court during counsel's management of the litigation. 9 Wigmore, Evidence Section 2594 (3d ed. 1940). Furthermore, such admissions are effective in both civil and criminal cases. 9 Wigmore, Evidence Section 2592 (3d ed. 1940); *see, e.g.,* United States v. Harding, 10 Cir. 1972, 475 F. 2d 480,484.

information which Serfass submitted to the Board establishes a prima facie claim for conscientious objector status[5] based upon late crystallization.

By letter dated January 14, 1971, defendant was notified that the "Local Board considered your entire file at their meeting on January 13, 1971, and unanimously agreed that there was no change over which you had no control and decided not to re-open your file." This is the only statement of reasons given by the Board in support of its decision.

Subsequently, he refused induction, and this prosecution followed.

The enumerated facts indicate clearly that Serfass is entitled to full consideration of his claim prior to assignment to combatant training and service. Ehlert v. United States, 1971, 402 U.S. 99, 103–04 & n.7, 107. Therefore, since the statement of reasons given for refusing to reopen is sufficiently ambiguous to be reasonably construed as a rejection on the merits,[6] thereby prejudicing his right to in-service review,[7] defendant's motion to dismiss the indictment will be granted.

Chief Judge
Middle District of Pennsylvania

Dated: July 16, 1973.

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[5] *See e.g.*, Thompson v. United States, 9 Cir. 1973, 474 F. 2d 323, 326.

[6] The courtesy interview given Serfass prior to the Board's decision would make such an interpretation particularly reasonable. United States v. Ziskowski, 3 Cir. 1972, 465 F. 2d 480, 485 n.13. This is not a case in which the Board's formulation compels the inference that its decision is based upon the jurisdictional limitation imposed by 32 C.F.R. 1625.2 (1971). United States v. Marabella, No. 15227 Criminal (M.D. Pa. April 5, 1973). *Compare* Ehlert v. United States, 1971, 402 U.S. 99, 100, *with* United States v. Alioto, 1 Cir. 1972, 469 F. 2d 722, 726, *and* United States v. Ziskowski, 3 Cir. 1972, 465 F. 2d 480, 484 & n.10.

[7] United States v. Folino, No. 72–1974 (3 Cir. June 29, 1973); United States v. Ziskowski, 3 Cir. 1972, 465 F. 2d 480; *accord*, United States v. Alioto, 1 Cir. 1972, 469 F. 2d 722; United States v. Shomock, 3 Cir. 1972, 462 F. 2d 338; *cf.* United States v. Kline, M.D. Pa. 1972, 354 F. Supp. 931, 939–40 & n.17, *aff'd without published opinion*, 3 Cir. 1972, 474 F. 2d 1337.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 73–1736

UNITED STATES OF AMERICA, APPELLANT

v.

DAVID EMERY SERFASS

(D.C. CRIMINAL NO. 15229)

Present: VAN DUSEN, ALDISERT and ROSENN, *Circuit Judges.*

JUDGMENT

ON APPEAL from the United States District Court for the Middle District of Pennsylvania.

THIS CAUSE came on to be heard on the record from the United States District Court for the Middle District of Pennsylvania and was submitted on briefs under Third Circuit Rule 12(6).

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the order of the said District Court, filed July 16, 1973, be, and the same is hereby reversed and the cause is hereby remanded to the District Court for trial or other further proceedings in accordance with the opinion of this Court.

THOMAS F. QUINN,
Clerk

February 20, 1974
Certified as a true copy and issued in lieu of a formal mandate on March 14, 1974.
Attest:

THOMAS F. QUINN,
Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 73–1736

UNITED STATES OF AMERICA, APPELLANT

v.

DAVID EMERY SERFASS

Appeal From United States District Court for the Middle District of Pennsylvania

Submitted under Third Circuit Rule 12(6) December 19, 1973
Before VAN DUSEN, ALDISERT and ROSENN, *Circuit Judges.*

JAMES W. WALKER, ESQUIRE
for appellant
HARRY A. DOWER, ESQUIRE
BOYD G. HIXSON, ESQUIRE
Dower, Mackson, Hauff & Hettinger
for appellee

OPINION OF THE COURT
(Filed February 20, 1974)

ROSENN, *Circuit Judge*

This appeal is hopefully one of the last of a long series of selective service cases involving the issue of whether an order to report for induction was invalid for failure of the local board to reopen the registrant's classification pursuant to a post-induction order request for conscientious objector status. Since the district court of the Middle District of Pennsylvania dismissed the indictment, the defendant also raises on appeal the issue of double jeopardy. Because we find the order of dismissal is appealable, and the dismissal was improper in light of the subsequent decision in *Musser v. United States*, 42 U.S.L.W. 3286 (U.S. November 13, 1973), we reverse.

The facts of this case are not in dispute. On November 16, 1970, Serfass was ordered by his local board to report for induction on December 1. He appeared on December 1 and requested a delay in his induction in order that he could submit additional medical evidence. The delay was granted, but on December 18 he was again ordered to report for induction, this time on January 18, 1971. On December 29, he visited his local board and requested the form for conscientious objector application, SSS–150. His form 150 was returned to the local board on January 8, and on January 13 he received a courtesy interview as he had requested. By letter dated January 14, the board notified him that it had considered his entire file and "unanimously agreed that there was no change over which you had no control and decided not to re-open your file." The board also informed him that he was still obligated to report for induction on January 18. No other reasons for the refusal to reopen his file were given. On January 18, Serfass appeared at the examining station and refused induction. This prosecution followed under 50 App. U.S.C. §462.

Before trial, Serfass moved for dismissal of the indictment on the ground that the local board had denied him due process by inadequately setting forth its reasons for denying his request to reopen his classification and to grant him conscientious objector

status. The district court granted this motion, relying on defendant's selective service file, his affidavit in support of his motion which set forth that he had applied for conscientious objector status and had received from his local board only the January 14 letter denying him claim, and a stipulation of counsel that the information he sent to the board set forth a prima facie conscientious objector claim based upon late crystallization of beliefs.

On the basis of the law prevailing in this Circuit at that time, the district court stated in its opinion:

> The enumerated facts indicate clearly that Serfass is entitled to full consideration of his claim prior to assignment to combatant training and service. *Ehlert v. United States*, 1971, 402 U.S. 99, 103–04 & n. 7, 107. Therefore, since the statement of reasons given for refusing to reopen is sufficiently ambiguous to be reasonably construed as a rejection on the merits, thereby prejudicing his right to in-service review, defendant's motion to dismiss the indictment will be granted. [Footnotes omitted.]

The footnotes indicate that the court relied primarily upon *United States v. Ziskowski*, 465 F.2d 480 (3d Cir. 1972), and *United States v. Folino*, No. 72–1974 (3d Cir. June 29, 1973).

I.

We first consider defendant's contention that we have no jurisdiction to hear this Government appeal from the district court's dismissal of the indictment. Resolution of this contention turns upon our construction of the Criminal Appeals Act, 18 U.S.C. § 3731, which reads:

> In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment or information as to any one or more counts, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution.

* * *

> The provisions of this section shall be liberally construed to effectuate its purposes.

This version of the Act is applicable to all actions begun in any district court after January 2, 1971, (84 Stat. 1890, 1893) and therefore applies to the present action.

Actions brought prior to January 2, 1971, were governed by an earlier version of the Criminal Appeals Act, the relevant portion of which made a criminal case appealable by the United States to the court of appeals:

> [F]rom a decision or judgment setting aside, or dismissing any indictment or information, or any count thereof, except where a direct appeal to the Supreme Court is provided by this section.

See United States v. Pack, 247 F.2d 168 (3d Cir. 1957).

Under this former version of the Act it is clear that no appeal by the United States would lie in the instant case. Appeals were permissible only if the dismissal of an indictment was based upon a defect in the indictment or in the institution of the prosecution, rather than upon evidentiary facts outside the face of the indictment which would possibly constitute a defense at trial. *See, e.g., United States v. Ponto*, 454 F.2d 657, 663 (7th Cir. 1971) (en banc); *United States v. Findley*, 437 F.2d 970 (1st Cir. 1971).

The 1971 amendment to § 3731, however, was clearly intended to enlarge the Government's right to appeal to include all cases in which such an appeal would be constitutionally permissible. Cases decided under the prior version of § 3731 are of little aid in determining appealability under the present version. *See United States v. Pecora*, 484 F.2d 1289 (3d Cir. 1973).

In *Pecora*, we held appealable under the present version of § 3731 the district court's pretrial dismissal of an indictment based upon a stipulation of the facts upon which the indictment was returned.

In discussing the appealability of the pretrial dismissal, we indicated that absent the defendant's waiver of his right to a jury trial pursuant to Rule 23(a) of the Federal Rules of Criminal Procedure, jeopardy does not attach until the jury has been impaneled and sworn. We held that entering into the stipulation of facts "for the purpose only of attacking the validity of the indictment did not constitute the waiver necessary under Rule 23(a)." Therefore, we concluded, since jeopardy had not attached at the time of the pretrial dismissal of the indictment, the government could appeal the dismissal. *United States v. Pecora*, 484 F.2d at 1292–93. We also rejected as inconsistent with §3731 the contention that our holding would discourage defense counsel from expediting procedure by making pretrial motions for dismissal, and instead encourage counsel to wait until the jury was sworn before making motions for dismissal. 484 F.2d at 1289. *See* Fed. R. Crim. Proc. 12(b).

We believe the instant appeal is squarely controlled by *United States v. Pecora, supra*. As in *Pecora*, the pretrial motion of dismissal was based upon undisputed facts raising a legal issue and the defendant did not waive his right to a jury trial.[1]

[1] The district court in this case expressly found that the defendant did not waive his right to a jury trial. Not only were none of the procedures required by Rule 23(a) complied with, but attached to the motion to dismiss the indictment was a motion to postpone the trial until after the disposition of the motion on the merits. *Cf.* United States v. Wilson, 73-1444 (3d Cir., filed January 15, 1974) (opinion sur denial of panel rehearing) (*post-trial* directed verdict of acquittal).

Pecora distinguished United States v. Hill, 473 F.2d 759 (9th Cir. 1972), which held unappealable the district court's pretrial dismissal of an indictment alleging the mailing of obscene advertisements. The dismissal was on the ground that the stipulated materials were not legally obscene. *Hill* was distinguished on two grounds. First, the Court of Appeals in *Hill* did not determine whether the defendant had waived his right to a jury trial. Second, in *Hill* "evidence was actually entered into the record. The district court determined the character of that evidence so it may be said that jeopardy had attached." We do not consider this second distinction between *Pecora* and *Hill* to permit our holding the instant order unappealable. To the extent that *Pecora* and *Hill* may be inconsistent, we are of course bound by *Pecora*.

Although the instant dismissal was based upon the trial court's finding that the defendant had established a defense as a matter of law, rather than upon the finding, as in *Pecora*, that there were insufficient facts as a matter of law to support a conviction, we see no significant constitutional difference between the two situations. Both involved a determination as to the legal sufficiency of certain facts, and in either case denial of the motion to dismiss entitled the defendant to the jury trial which he has not waived. We therefore hold that jeopardy did not attach and the dismissal of the indictment in the instant case was an appealable order.[2]

II.

Our consideration of the merits of the Government's appeal requires a cursory review of the line of cases in this circuit upon which the district court's dismissal of the indictment was based. At all pertinent times, the post-induction order reopening of a registrant's selective service classification by his local board was governed by Regulation 1625.2, 32 CFR §1625.2, which provided that,

> [T]he classification of a registrant shall not be reopened after the local board has mailed to such registrant an Order to Report for Induction . . . unless the local board *first specifically finds* there has been *a change in the registrant's status resulting from circum-*

[2] *Accord*: United States v. Martin Linen Supply, 485 F.2d 1143 (5th Cir. 1973); United States v. Brown, 481 F.2d 1035 (8th Cir. 1973).

Contra: United States v. Southern Railway Company, 485 F.2d 309 (4th Cir. 1973); United States v. Rothfelder, 474 F.2d 606 (6th Cir), *cert. denied*, 413 U.S. 922 (1973); United States v. McCreery, 473 F.2d 1381 (7th Cir. 1973).

See also: United States v. Hill, 473 F.2d 759 (9th Cir. 1972), distinguished by this court in *Pecora*. *See* note 1 *supra*.

stances over which the registrant had no control.[3]
[Emphasis supplied.]

In *Ehlert v. United States*, 402 U.S. 99 (1971), a registrant who had submitted a post-induction order conscientious objector claim refused induction after being notified by his local board that,

> [I]t had declined to reopen his classification because the crystallization of his conscientious objection did not constitute the "change in the registrant's status resulting from circumstances over which the registrant had no control" required for post-induction notice reopening.

402 U.S. at 100. The Supreme Court affirmed the ensuing conviction, rejecting the registrant's claim that crystallization of conscientious objection is a circumstance over which he had no control. While agreeing that the language of the regulation was "not free from doubt," the Court regarded as controlling the Government's "plausible" and "consistently urged" interpretation that the regulation only applied to "objectively identifiable" and "extraneous" circumstances, 402 U.S. at 104, and that reopening was not required for a change in beliefs.

Furthermore the Court held this interpretation to be a valid timeliness rule, since the military already had procedures for handling in-service conscientious objector claims, and post-induction order claims could legitimately be decided by the military forum as long as claimants were not subject to combatant training or service until their claims had been acted upon.

[3] Regulation 1625.2, 32 CFR §1625.2 in pertinent part provided:

The local board may reopen and consider anew the classification of a registrant . . . upon the written request of the registrant . . . if such request is accompanied by written information presenting facts not considered when the registrant was classified, which, if true, would justify a change in the registrant's classification; . . . provided . . . the classification of a registrant shall not be reopened after the local board has mailed to such registrant an Order to Report for Induction (SSS Form No. 250) . . . unless the local board first makes the finding that there is a change in status resulting from circumstances over which the registrant had no control.

The Court held, however, that "a 'no man's land' would be intolerable," 402 U.S. at 104 n. 7, and a conscientious objector claimant must be given some opportunity to have his claim heard on the merits, either by his local board or by the military, whenever the change in his beliefs occured. The Court therefore felt obligated to look at existing military procedures to determine whether the requirement that all claimants receive some forum to present their claims was met in practice. Although recognizing that the "somewhat inconsistent" military regulations "contained formulations seeming to look the other way," 402 U.S. at 106,[4] the Court relied upon a letter written by the General Counsel of the Army which stated that present practice, as well as practice when the registrant had been ordered to report for induction, permitted presentation to the military of such post-induction order conscientious objector claims, and that there was no possibility that late crystallizers would find themselves without a forum in which to present their claims. The Court accepted this statement, warning that if a situation should arise "in which neither the local board nor the military had made a full opportunity to present a prima facie conscientious objector claim for determination under established criteria, . . . a wholly different case would be presented." 402 U.S. at 107. The Court concluded by stating that,

> [W]e hold that the Court of Appeals did not misconstrue the Selective Service regulation in holding that

[4] The Court cited Army Regulation No. 635–20, ¶3:

a. Consideration will be given to requests for separation based on bona fide conscientious objection to participation in war, in any form, when such objection develops subsequent to entry into the military service.

b. Federal courts have held that a claim to exemption from military service under Selective Service laws must be interposed prior to notice of induction, and failure to make timely claim for exemption constitutes waiver of the right to claim . . . Requests for discharge after entering military service will not be favorably considered when –

(1) Based on conscientious objection which existed, but which was not claimed prior to notice of induction, enlistment or appointment.

it barred presentation to the local board of a claim that allegedly arose between mailing of a notice of induction and the scheduled induction date.

402 U.S. at 107–108.

United States v. Shomock, 462 F.2d 338 (3d Cir. 1972), raised the question of whether *Ehlert* had overruled our decision in *Scott v. Commanding Officer*, 431 F.2d 1132 (3d Cir. 1970), and this court answered in the negative. The registrant had filed a post-induction order conscientious objector claim and had refused induction after being informed by the local board that the information he had submitted did not warrant reopening of his classification.

This court reversed the ensuing judgment of conviction. First, we held, under *Scott* the local board was obliged to inform the registrant of the basis for its denial of his claim, whether it was for "lack of jurisdiction or some other technical reason or was a decision based on the merits of Shomock's claim." 462 F.2d at 346. Furthermore, we held, *Ehlert* did not compel a different result because in the case at hand there was doubt that the registrant would in fact have received a full and fair hearing by the military of his conscientious objector claim. First, this court feared that the military might rely on AR 635–20 ¶ 3(b)(2),[5] not cited in *Ehlert*, to deny the registrant an in-service hearing on the merits of his claim on the ground that his claim had already been denied by the local board prior to induction.

Second, we noted that AR 635–20 ¶ 3(b)(1) at the time the registrant had refused induction and until August 15, 1970, precluded on its face in-service review of conscientious objector

[5] AR 635–20, ¶ 3(b) provides:

. . . Requests for discharge after entering military service will not be favorably considered when –

* * *

(2) Based solely on conscientious objection claimed and denied by the Selective Service System prior to induction.

This provision is quoted in United States v. Ziskowski, 475 F.2d 480, 485 (3d Cir. 1972).

claims which arose before induction, even if the claim arose after the registrant had received his induction notice.[6] This court therefore did not consider persuasive a letter addressed to it by the General Counsel of the Department of the Army which apparently relied upon the *amended* version of ¶ 3(b)(1), cited in *Ehlert*. The letter stated that Army practice was to permit in-service review of post-induction order conscientious objector claims which had been denied by a local board solely because of late crystallization of beliefs.[7]

For both of these reasons, the military might have refused to consider the registrant's claim on the merits, even though the local board might have rejected his claim by relying solely upon *Ehlert* without reaching the merits of his claim. There was a strong possibility, therefore, that the registrant had been placed

[6] The provision had read as follows:

. . . Requests for discharge after entering military service will not be favorably considered when –

(1) Based solely on conscientious objection which existed but was not claimed *prior to induction*, enlistment, or entry on active duty for training. [Emphasis supplied.]

On August 15, 1970, the emphasized language was amended to read "prior to notice of induction." The amended version was quoted *Ehlert*. *See* note 4 *supra*.

[7] The relevant portions of the letter asserted the following:

If the appellant had entered the Army in May 1969 under circumstances where the Selective System actually considered and denied his conscientious objector claim on the merits, he would not have been entitled to an in-service determination on the merits of his conscientious objector claim.

If the appellant had entered the Army in May 1969 under circumstances where his local draft board merely refused to reopen his classification because his asserted views crystallized subsequent to the receipt of his induction notice, in the view of the Department of the Army personnel responsible for administering the conscientious objector claims of in-service members, he would have been entitled under Army policy to an in-service determination on the merits of his conscientious objector claim.

462 F.2d at 345 n. 17.

in the "no man's land" condemned by *Ehlert*, with no opportunity to have his post-induction order conscientious objector claim considered on the merits. His induction order was therefore held invalid.

The same issue was presented in *United States v. Ziskowski*, 465 F.2d 480 (3d Cir. 1972). The registrant had filed a post-induction order conscientious objector claim, and in response had received, following an interview, a letter stating that,

> It is the determination of the board that there has been no change in your status resulting from circumstances over which you had no control. Your classification has not been reopened.

465 F.2d at 481. On the authority of *Scott*, *supra*, this court reversed the ensuing conviction for refusing induction. We distinguished *Ehlert* by noting that the local board in that case had indicated that its refusal to reopen the registrant's classification was based on its finding that crystallization of conscientious objector beliefs was not a circumstance over which the registrant had no control. In the case before the court, however, it was not clear whether the denial was for this reason or for any one of several other reasons. *See* 465 F.2d at 482–483.

Moreover, this court found "substantial support" for this result from *Ehlert* itself. Relying on AR 635–20 ¶ 3(b)(2),[8] not cited in *Ehlert*, the court reasoned that even if the military interpreted that regulation to bar only in-service review of claims which had been denied *on the merits* by a local board,[9] the military might reasonably have construed the Board's action as to Ziskowski as having been a determination on the merits precluding in-service review. Therefore Ziskowski would have been in the "no man's land" which had been disapproved by *Ehlert*. The local board might have denied his claim for procedural reasons, while the military, interpreting the local board's denial as having been on the merits, might have then refused to consider his claim.

[8] *See* note 5 *supra*.

[9] As noted in *Ziskowski*, this interpretation was later adopted explicitly. 465 F.2d at 485 n. 12.

In *United States v. Folino*, No. 72–1974 (3d Cir., June 29, 1973), this court reversed a selective service conviction on the authority of *Ziskowski*.

The Supreme Court appears to have placed an abrupt end to this line of cases, however, by its recent per curiam decision in *Musser v. United States*, 42 U.S.L.W. 3286 (U.S. November 13, 1973). That case involved the consolidated appeal by two selective service registrants who had been convicted for refusing induction after having their post-induction order conscientious objector claims rejected by their local boards. One registrant had received a letter from his board stating that the board "did not specifically find there has been a change in status resulting from circumstances over which you had no control." The other registrant had received a letter stating simply that the board "found no ground for reopening your classification."

Petitioners relied upon *Ziskowski*, *Shomock*, and *United States v. Alioto*, 469 F.2d 722 (1st Cir. 1972), a similar case. The Supreme Court flatly rejected the reasoning of these cases. In answering the argument that the military might consider the local board's refusal to reopen to have been on the merits when it was in fact procedural, the Court stated that *Ehlert* had held that a local board was "without power" to rule on the merits of a post-induction order conscientious objector claim, and

> [f]rom this it follows that in no event can a mere refusal to reopen signify more than a recognition of lack of power to do so; it cannot and does not bear any significance as to the merits of a registrant's claim.
>
> * * *
>
> [N]o matter what the board's apparent motivations in refusing to reopen the petitioner's classification may have been, the boards were simply without power to reopen, and an expressed or unexpressed indication of

> the board's views of the claims cannot be deemed a denial of those claims on the merits.

As in *Ehlert*, the Court then turned "to a consideration of whether 'the conditions for the validity of such a rule . . . are met in practice.' " The Court noted AR 635–20, ¶ 3(b)(2), which seemed to bar in-service review of a claim which had been "claimed and denied" before induction.[10] The Court stated that,

> While the critical word "denied" might arguably be applied to a board's refusal to reopen a classification, it cannot be so applied to a refusal to reopen a classification based on a claim of conscientious objection crystallizing after issuance of a notice to report, now that Ehlert has made clear that such a refusal can only be based on the board's lack of power to reopen in such a posture.

The Court also relied upon the letter written by the General Counsel of the Department of the Army which we had considered in *Shomock*,[11] and which stated that when a refusal to reopen by a local board is not based on the merits, the registrant could receive a full in-service hearing on the merits. The Court concluded that,

> In the event that a local board in one way or another manifests its views as to the sincerity of late-crystallizing registrants' claims, such expressions must be given no effect by the armed forces in reviewing an in-service conscientious objection request.

Mr. Justice Douglas, in dissent, pointed out that "[t]he opinions summarily affirmed today conflict squarely, as the Solictor General concedes, with decisions in the First, Second, and Third Circuits." Included in the list of cases that follows this statement are *Shomock*, *Ziskowski*, and *Folino*. We agree that these three cases are inconsistent with *Musser* and for that reason are no longer the law.

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[10] *See* note 5 *supra*.

[11] *See* note 7 *supra*.

Musser was decided after the district court dismissed the indictment in this case, and of course long after Serfass himself refused induction. We must therefore decide whether *Musser* is to be applied retroactively to registrants who refused induction before the case was decided.

We have no hesitation in answering this question in the affirmative. *Musser* did not announce any new principle of law. Rather, the case, by relying on indications of military policy which were already before us in *Shomock* and *Ziskowski*, held that our interpretation of military policy in those cases was incorrect; there was no danger that the registrants whose convictions we had reversed would have found themselves in a "no man's land."

Furthermore, the two registrants whose convictions were affirmed in *Musser* had refused induction in February 1969 and January 1971, respectively. Serfass, as noted, refused induction in January 1971. *Musser* appears to hold, therefore, that even at the time Serfass refused induction, he would have been permitted by military policy to obtain an in-service review of his conscientious objector claim. He therefore cannot justify his refusal of induction on the ground that he faced the "no man's land" of *Ehlert*, even though his local board did not explain why it had denied his conscientious objector request.[12]

The order of the district court granting the motion to dismiss

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[12] *Ehlert* was decided on April 21, 1971. Serfass refused induction after *Scott* but before *Ehlert*. The Court in *Musser* implicitly held *Ehlert* retroactive, however, since it interpreted *Ehlert* as requiring the affirmance of two convictions for refusing induction, even though both acts had taken place before *Ehlert* was decided.

We note that since neither conviction affirmed by the Court in *Musser* involved a refusal of induction in a circuit in which the prevailing case law was at the time clearly contrary to *Ehlert*, the Court did not necessarily decide whether actual good faith reliance on pre-Ehlert case law might negate the element of willfulness necessary to sustain a conviction. *See*, e.g., United States v. Mercado, 478 F.2d 1108 (2d Cir. 1973).

the indictment will be reversed. The case will be remanded to that court for trial or other proceedings consistent with this opinion.

Supreme Court, U. S.
FILED
JUN 10 1974
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1424

DAVID EMERY SERFASS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

APPENDIX

PETITION FOR CERTIORARI FILED MARCH 22, 1974
CERTIORARI GRANTED APRIL 22, 1974

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APPENDIX A

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Lower Court Opinion

APPENDIX B

JUDGMENT of
UNITED STATES COURT OF
APPEALS FOR THE THIRD CIRCUIT

APPENDIX C

OPINION of
UNITED STATES COURT OF
APPEALS FOR THE THIRD CIRCUIT

These portions of petitioner appendix are set forth in the petition for a writ of certiorari.

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

No. 15229 Cr.

Vio: 50 App. U.S.C. 462

UNITED STATES OF AMERICA

v.

DAVID EMERY SERFASS

MOTION TO DISMISS THE INDICTMENT

Harry A. Dower of counsel for the Defendant, moves that the Indictment be dismissed on the following grounds, which are supported by the attached Affidavit of the Defendant:

1. That David Emery Serfass is the Defendant in the above-cited case;

2. That the Defendant had been ordered for induction into the Armed Forces of the United States on December 18, 1970, such induction to have taken place on January 18, 1971;

3. That the Defendant applied for Conscientious Objector Status, classification I-O, on December 29, 1970 to Local Board No. 89;

4. That Local Board No. 89 considered the entire file of the Defendant at a meeting on January 13, 1971 and unanimously agreed "that there was no change over which [the Defendant] had no control" and on this basis decided not to re-open Defendant's file;

5. That such notice, received by the Defendant by letter dated January 14, 1971 from Local Board No. 89, concluded that the Defendant was still under Order to report for induction on January 18, 1971;

6. That the recent cases of *United States of America v. Shomock*, 462 F. 2d 338 (June 20, 1972) and *United States of America v. Ziskowski*, 465 F. 2d 480 (August 14, 1972), both decided by the Third Circuit Court of Appeals, indicate that if the Local Board gives no reasons as to why the claimants file will not be re-opened other than the prefuntory "no change over which you had no control," it is inadequate under the holdings of *Scott v. Commanding Officer*, 431 F. 2d 1132 (1970) and *U.S. v. Neamand*, 452 F. 2d 25 (3d Cir. 1971), as it would be impossible to tell "whether the Board's refusal was based on lack of jurisdiction or some other technical reason or was a decision based on the merits of [the]. . . claim." *United States v. Shomack*, supra., at 346.

HARRY A. DOWER,
First Valley Bank Bldg.
Allentown, Pennsylvania 18105
AC 215-821-8700
Of Counsel for the Defendant

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

No. 15229 Cr.

Vio: 50 App. U.S.C. 462

UNITED STATES OF AMERICA

v

DAVID EMERY SERFASS

SS.:

COMMONWEALTH OF PENNSYLVANIA
COUNTY OF LEHIGH

David Emery Serfass, the Defendant herein, being duly sworn according to law, deposes and states that the facts set forth below are true and correct to the best of his knowledge, information and belief.

1. That he is the Defendant in the above cited case;

2. That he applied for Conscientious Objector status, classification I-O, on December 29, 1970 to Local Board No. 89;

3. That, on December 18, 1970, he had been ordered for induction into the Armed Forces of the United States, such induction to have taken place on January 18, 1971;

4. That Local Board No. 89 considered the entire file of the Defendant at a meeting on January 13, 1971 and unanimously agreed "that there was no change over which (the Defendant) had no control" and on this basis decided not to re-open Defendant's file;

5. That such notice, being the only such communication, was received by the Defendant by letter dated January 14, 1971

from Local Board No. 89, concluding that the Defendant was still under Orders to report for induction on January 18, 1971. A true and correct copy of this letter is attached and marked Exhibit "A".

DAVID EMERY SERFASS

Sworn to and Subscribed before me this 29th day of December, 1972.

SARA L. KALB
Notary Public, Allentown, Lehigh County
My Commission Expires February 18, 1974

EXHIBIT A

36-89-46-524

January 14, 1971

Mr. David E. Serfass
22 N. Fairview St.
Allentown, Pa. 18104

Dear Sir:

The Local Board considered your entire file at their meeting on January 13, 1971, and unanimously agreed that there was no change over which you had no control and decided not to re-open your file.

You, therefore, are still under Orders to report for Induction on January 18, 1971 at 5:15 A.M.

FOR THE BOARD:

(Miss) Mamie C. Bramwell
Executive Secretary

MB/lz

APPENDIX F

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

36-89-46-524

December 18, 1970

Mr. David E. Serfass
22 N. Fairview Ave.
Allentown, Pa. 18104

Dear Sir:

You are hereby ordered for induction into the armed forces of the United States, and to report at the Salvation Army Headquarters, 810 Turner St., Allentown, Penna. on January 18, 1971 at 5:15 A.M. for forwarding to the Armed Forces Induction Station.

PLEASE BRING THIS NOTICE WITH YOU.

FOR THE BOARD:

(Miss) Mamie C. Bramwell
Executive Secretary

MB/la

To:

Local Board 89

I David Serfass would like to file for (SSS Form 150) the special form for conscientious objector.

Thank You.

DAVID SERFASS
36-89-46-524

36-89-46-524

January 14, 1971

Mr. David E. Serfass
22 N. Fairview St.
Allentown, Pa. 18104

Dear Sir:

The Local Board considered your entire file at their meeting on January 13, 1971, and unanimously agreed that there was no change over which you had no control and decided not to re-open your file.

You, therefore, are still under Orders to report for Induction on January 18, 1971 at 5:15 A.M.

FOR THE BOARD:

(Miss) Mamie C. Bramwell
Executive Secretary

MB/la

APPENDIX G

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

No. 15229 Cr.

Vio.: 50 App. U.S.C. 462

UNITED STATES OF AMERICA

v.

DAVID EMERY SERFASS

MOTION TO POSTPONE TRIAL

AND NOW, to wit, this 28th day of December, 1972, the Defendant, by Harry A. Dower, Esquire, of counsel for the Defendant, moves the Court to postpone the trial of the within matter which is now scheduled for January 9, 1973, for the reason that a Motion to Dismiss has been simutaneously filed and the expeditious administration of justice will be served best by considering the Motion prior to trial.

HARRY A. DOWER,
First Valley Bank Building
Center Square
Allentown, Pa. 18101
Counsel for the Defendant

APPENDIX H

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

No. 15229 Cr.

UNITED STATES OF AMERICA

v.

DAVID EMERY SERFASS

ORDER

Defendant, David Emery Serfass, having filed a motion to continue the jury trial scheduled for Tuesday, Janary 9, 1973, at 10:00 A.M., at the United States Courthouse, Harrisburg, Pennsylvania,

It is ORDERED that the motion is granted and the trial is continued.

MICHAEL H. SHERIDAN
Chief Judge
Middle District of Pennsylvania

Dated: January 5, 1973.

APPENDIX I

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

No. 15229 Cr.

UNITED STATES OF AMERICA

v.

DAVID EMERY SERFASS

ORDER

NOW, this 5th day of January, 1973, it is ORDERED that Tuesday, February 6, 1973, at 2:30 P.M., at the United States Courthouse, Harrisburg, Pennsylvania, is fixed as the time and place for oral argument on defendant's motion to dismiss.

MICHAEL H. SHERIDAN
Chief Judge
Middle District of Pennsylvania

APPENDIX J

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

No. 15229 Cr.

UNITED STATES OF AMERICA

v.

DAVID EMERY SERFASS

ORDER

Defendant having filed a motion to dismiss the indictment, and the parties having submitted briefs and made oral argument in support of their respective positions,

It is ORDERED that the parties submit a copy of defendant's Selective Service file within thirty (30) days of the date of this order.

MICHAEL H. SHERIDAN
Chief Judge
Middle District of Pennsylvania

Dated: June 11, 1973.

APPENDIX K

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

June 14, 1973

The Honorable Michael Sheridan
Chief Judge
United States District Court
Middle District of Pennsylvania
United States Court House
Wilkes-Barre, Pennsylvania

Re: United States v. David E. Serfass
Criminal No. 15229

Dear Judge Sheridan:

Enclosed please find the Selective Service file of David E. Serfass as per your order of June 11, 1973.

Sincerely,

BOYD G. HIXSON

BGH:paf
Enclosure

APPENDIX L

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

No. 15229 Cr.

UNITED STATES OF AMERICA
v.
DAVID EMERY SERFASS

ORDER

In accordance with the memorandum this day filed, it is ORDERED that defendant's motion is granted, and the indictment is dismissed.

MICHAEL H. SHERIDAN
Chief Judge
Middle District of Pennsylvania

Dated: July 16, 1973.

APPENDIX M

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D. C. 20543

April 22, 1974

Boyd G. Hixson, Esq.
Law Office of Harry A. Dower
3d Floor, 1st Valley Bank Bldg.
Center Square
Allentown, Pa. 18105

RE: SERFASS v. UNITED STATES
No. 73-1424

Dear Mr. Hixson:

The Court today took the following action in the above case:

"The petition for a writ of certiorari is granted."

Enclosed are memorandums describing the time requirements and procedures under the Rules.

The additional docketing fee of $50, Rule 52(a) is due and payable.

Very truly yours,

MICHAEL RODAK, JR., Clerk
By

(Mrs.) Helen K. Loughran
Assistant Clerk

AIR MAIL
Encls.

APPENDIX N

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

No. 15229 Cr.

UNITED STATES OF AMERICA
v.
DAVID EMERY SERFASS

FILINGS–PROCEEDINGS

1972	
Oct. 11	Indictment– 1 Count of a true bill
Oct. 12	Order for Warrant– for arrest of deft. pursuant to Bail Reform Act of 1966. WJN
	Warrant issued & handed to United States Marshal w/cc of indictment
Oct. 20	United States Marshal's return– on warrant for arrest of deft. executed as directed.
Nov. 29	Notice of Arraignment– set for 12-22-72 at 11:30 AM Wilkes-Barre
	Copies mailed to United States Attorney and deft., United States Marshal, Probation Office and FBI
Dec. 4	Receipt– for notice.
Dec. 22	Plea of Defendant – not guilty
Dec. 22	Minute sheet of the– clerk, trial date set for Tuesday, Jan. 9, 1973 at 10:00 AM at Harrisburg, Pa. jury trial demanded.
1973	
Jan. 9	Memorandum of clerk– trial scheduled for 1/9/73 continued by court. No new date set. Yellow sheet of paper.
12/30/72	Motion to Dismiss– Indictment.
12/30/72	Affidavit of– deft. together with Exhibit "A".
12/30/72	Motion to Postpone– Trial.

Jan. 5 Order granting motion to postpone trial. Trail is continued cc: to all concerned. MHS

Jan. 5 Order – fixing 2/6/73 at 2:30 PM at Harrisburg as time and place for oral argument on Motion to Dismiss. cc: to all concerned. MHS

Feb. 6 Clerk's minutes sheet – on hearing on deft's motion to dismiss. Taken under advisement. MHS

Feb. 6 Government's brief – opposing the deft's motion to dismiss the indictment.

June 11 Order of court – directing that parties submit a copy of the Defendants Selective Service file to the Court within 30 days of the date of this order. (MHS) cc: to all concerned.

July 13 Memorandum – of Defendant in support of his motion to dismiss.

July 15 Exhibit No. 1 –

July 15 Exhibit No. 2 –

July 16 Memorandum – of Judge Sheridan re defendant's motion to dismiss indictment. (S) cc: to all concerned.

July 16 Order – that Defendant's motion is granted, and the indictment is dismissed. (S) cc: to all concerned.

July 16 JS 3 of 3

Copies of above Memorandum and Order mailed to S. John Cottone, Harry A. Dower, Esq. and Thomas Foley, Jr., Esq., Michael Eagan, Esq. and Boyd Hixson Esq.

Aug. 15 Notice of Appeal – of the order of Court dated July 16, 1973 by the United States Attorney.

Aug. 17 Clerks letter – of transmittal to the Clerk, United States Court of Appeals along with the original documents.

Aug. 21 Receipt – for record on appeal.

Aug. 23 Order United States Court – of Appeals setting briefing schedule etc.

1974

March 4 Opinion – of Court of Appeals reversing the District Court order granting dismissal of indictment. Case will be remanded to District Court for trial or other proceedings consistent with this opinion.

March 15 Judgment – of Court of Appeals reversing order of District Court dated 7/16/73 and the cause is hereby remanded to the District Court for trial or other proceedings in accordance with the opinion of this Court. cc: to Judge Sheridan.

APPENDIX O

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 73-1736

UNITED STATES OF AMERICA, APPELLANT

v.

DAVID EMERY SERFASS

No. 15229 Cr.

JAMES W. WALKER, ESQUIRE
for appellant
HARRY A. DOWER, ESQUIRE
BOYD G. HIXSON, ESQUIRE
Dower, Mackson, Hauff & Hettinger
for appellee

FILINGS–PROCEEDINGS

1973

Aug. 23 Certified copy of Notice of Appeal, recd' August 17, 1973, filed.

Record, rec'd. August 17, 1973, filed.

Order (Clerk) directing that if the transcript is desired and has not been filed, it shall be ordered forthwith, with the proper arrangements for payment to be made; directing the court reporter to file the transcript on or before Sept. 24, 1973; directing appellant's brief and the appendix be filed and served within 30 days of the filing of the transcript in the DC, or within 30 days of the date of this

order, whichever is later; directing appellee's brief be filed and served 21 days after appellant's brief and the appendix are filed and served and directing the Clerk of the DC to deliver a copy of this order to the court reporter, filed.

Certified copy of above order to C of DC and Ct. Rep.

Aug. 28 Appearance of Harry A. Dower and Boyd G. Hixson, Esqs.; Dower, Mackson, Hauff & Hettinger for appellee, filed.

Sept. 2 Appearance of James W. Walker, Esq. for appellant, filed.

Sept. 20 Consent motion by appellant for leave to extend time for filing brief and appendix to and including October 24, 1973, filed. (4 cc.).

Sept. 21 Above consent motion denied. Counsel's attention is directed to the provisions concerning delay in the order of August 23, 1973. *Clerk.*

Sept. 24 Letter rec'd September 24, 1973 from counsel for appellant, considered as appellant's motion for leave to extend time to file brief and appendix and for leave to file in typewritten form, filed. (1 cc.). Proof of service in letter dated October 3, 1973.

Sept. 28 Submitted on above letter-motion. Clerk.

Oct. 1 Order *(Clerk)* granting appellant's letter-motion for leave to extend time to file brief and appendix and for leave to file in typewritten form; and brief for appellant and the appendix are to be filed and served not later than October 4, 1973, filed.

Oct. 9 Brief for appellant, filed. (7 cc.).

Oct. 9 Appendix, filed. (7 cc.).

Oct. 29 Brief for appellee, filed. (11 cc. – 14 add'l rec'd November 1, 1973).

Oct. 29 Motion by appellee to quash appeal for lack of jurisdiction, filed. (12 cc.). Proof of mailing in

letter dated October 26, 1973.

Nov. 16 Submitted on above motion. Coram: Van Dusen, Aldisert and Rosenn.

Dec. 4 Order *(Van Dusen,* J.) directing case be listed for disposition without oral argument and submitted pursuant to Rule 12(6), filed.

Dec. 19 Submitted on briefs. Coram: Van Dusen, Aldisert and Rosenn.

1974

Feb. 20 Opinion of the Court (Van Dusen, Aldisert and *Rosenn,* C.J.), filed.

Feb. 20 Judgment (Van Dusen, Aldisert and Rosenn, C.J.) reversing the order of the District Court, filed July 16, 1973; and remanding the cause to the District Court for trial or other further proceedings in accordance with the opinion of this Court, filed.

Mar. 14 Certified judgment in lieu of formal mandate issued.

Mar. 14 Record returned to C. of D. C.

Mar. 27 Notice of filing (on March 22, 1974) of petition for writ of certiorari, rec'd from Clerk of S.C., filed. (S.C. No. 73-1424)

Apr. 29 Certified copy of order (dated April 22, 1974) granting petition for writ of certiorari, rec'd from Clerk of S.C., filed. (S.C. No. 73-1424)

APPENDIX P

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF CALIFORNIA

No. 7145IH

UNITED STATES OF AMERICA

v.

RUTH LINETSKY
LIONEL PERRY
LINETSKY PRODUCTS INC.
PHOTO NEWS MONTHLY, INC.

PROCEEDINGS

12/22/70 Ent ord for flg Indict & for issu of B/W's as to defts Linetsky & Perry & for fxg bail at $1,000.00 C/S as to defts Linetsky & Perry & summons to be issd by U.S. atty. as to defts Linetsky Products, Ind. & Photo News Monthly Inc. Fld Indict. Issd B/W's. Md JS-2. (DWW)

12/23/70 Fld Ord (DWW) that bail originally set at $1,000.00 C/S as to each deft be reduced to $1,000.00 P/R as to each deft.

12/28/70 Fld B/W's retnd Exec as to defts Linetsky & Perry. (2 sep docs)

1/13/71 Fld summs retnd svd as to Photo News Monthly, Inc. Fld summs retnd svd as to Linetsky Products, Inc.

1/18/71 Trial Setting: Court ords case set for 7 day jury trial 4/27/71, 10 a.m. All mots to be fld by 3/8/71. Govt reply due 3/15/71. All mots to be nted for hrg 3/22/71, 1:30 p.m. Defts waive right to speedy trial. Mtter set on cal of 2/22/71, 3 p.m. for prelim P/T. (IH)

1/18/71 Fld design of cnsl, Edwin Rosendahl for all defts.
All defts, Linesky, Perry, Linetsky Products, Inc & Photo News Monthly, Inc. are arr & T/N as chgd. All four (4) defts plead Not Guilty to Indict.

Deft Linetsky, counts 1 thru 36; Perry counts 1 thru 36, Linetsky Products, cts 1 thru 13, 16, 17, 19, 20, 21 25, 28, 30 thru 36; Deft Photo News counts 14, 15, 18, 22 thru 24, 26, 27, 29 & 33. Court ords case assigned to the cal of Judge Irving Hill for all fur procs & cont to 2 p.m. this date for trial setting. Fld defts Perry & Linetsky stmt of defts' constitutional rights. (DWW).

2/2/71 Fld Deft's Stipulation w/ exhibits.

2/2/71 Fld $1,000.00 P/R bond posted 12/23/70 bef US Magistrate Marvin G. Weeks at Los Angeles, California. Fld Notc of fld Bond as to deft Lionel Perry.

Fld $1,000.00 P/R bond posted 12/23/70 bef US Magistrate Marvin G. Weeks at Los Angeles, California. Fld Notc of Flg Bond as to deft Ruth Linetsky.

2/22/71 Re all defts: Prelim pre-trial held: Cnsl for defts, Edwin M. Rosendahl, advises he may file mtn to dismiss as to all defts. Ct & cnsl confer. Ord trial date of 4/27/71 stand (IH)

3/2/71 Fld Deft's Mot for a Bill of Particulars & Mot for Discovery & Production of Documents retnbl 3/22/71 bef (IH).

Fld Deft's Mot to Inspect Minutes of Grand Jury Proceedings retnbl 3/22/71.

Fld Deft's Affidavit of Edwin M. Rosendahl in Support of Defts' Mot to Inspect Grand Jury Minutes & Memo of Pts & Authorities in Support of said Mot.

Fld Defts' Mot to Dismiss the Indict retnbl 3/22/71 bef (IH).

Fld Brief in Support of Mot to Dismiss the Indict.

Fld Deft's Appendix to Brief in Support of Mot to Dismiss the Indict.

3/4/71 Fld Not of Mots (fld 3/2/71) retnbl 3/22/71, 1:30 p.m. bef (IH)

3/15/71 Fld pltf's combined response to defts' mots for: inspection of G/J mins of procs, for bill of particulars, discovery & production & for dismissal of the indictment.

3/22/71 Ent prcdgs: Fld deft's req for vacation of trial date & waiver of right to speedy trial. Ord trial set on cal of 4/27/71, vacated Deft's mot to inspect F.J. minutes denied. Govt cnsl agrees to furnish Jencks Act stmts 48 hrs prior to testimony. Deft's mot to dismiss deferred until ruling by Supreme Court in related cases. Govt cnsl to furnish deft's cnsl within 10 days copy of the material that is subject of each CT. of the Ind. All other aspects of deft's mots not specifically ruled upon are either w/drawn or satisfied. Govt cnsl to advise Court & cnsl re: meaning of terms "obscene, lewd, etc. within 2 weeks, etc. Govt cnsl Ord to advise deft's cnsl whether if any recipients of material that is subject of Indict were minors. Atty Fox to prepare formal order for the Court's sig and submit same approved as to form by deft's cnsl. Cnsl. to advise Court when ruling in related cases is made. (IH)

3/30/71 Fld Govt's Suppl Response to Defts' Bill of Partics.

5/13/71 Ord deft's pending mot to dismiss calendared for hrg 6/10/71, 9:30 a.m. Cnsl for the moving parties will be allowed one hour to argue. Said hour to be allotted amongst the three cnsl in this case and the two related cases as agreed. Govt cnsl to be allowed same time under same conds. Trial to be re-set after hrg on mot. (IH) Cnsl ntfd by Phone and cyps. mld to cnsl. (IH)

6/10/71 Ent prcdgs: Ord deft's mot to dismiss denied as to all aspects except the constitutionally protected

expression aspect which shall be set for hrg 7/30/71, 10:00 a.m. Deft have to and incl. 6/30/71 to file any memos, etc., pltf's reply thereto due 7/20/71. Fld exbt. Ord exbt sealed. (IH)

6/11/71 Fld Substitution of Atty (IH) substituting Robert N. Harris in place and stead of Edwin M. Rosendahl as to deft Lionel Perry.

6/17/71 Fld Pltf's Mot & Not of Mot retnbl 7/12/71, 1:30 p.m. bef (IH) for Modification of Order of 6/10/71 re: Defts' Mots to Dismiss.

6/17/71 Fld Application for Order Shortening Time to File Mot of Pltf. Application Denied by (IH)

6/18/71 Fld Defts' Memo of Pts & Atuhrs.

7/9/71 Fld Adoption of defts' pts & auths by deft Lionel Perry & joins in and adopts "Defts' Memo of pts & auths" fld by Edwin M. Rosendahl on behalf of other defts.

7/12/71

Hrg Mot: Pltf's mot for ord modifying Court's previous ord denied. Govt cnsl to submit formal order for the Court's Signature. (IH)

7/20/71 Fld Govt's Memo of pts & auths:

(1) renewing its objection to the proposed hearing set for July 30, 1971, on additional grounds; and (2) Govt's response, in opposition, to defts' pts & auths in suppt of comparative samplars to be tendered by defts, with exbts 1, 2, 3, 4, 5.

7/16/71 Fld Ord (IH) Denying Pltf's Modify Ord.

7/26/71 Fld Deft's Reply Memo of pts & auths.

7/30/71 Upon Crt's own mtn, ORD fur hrg on deft's mtn to dismiss deferred until 8/5/71, 10 a.m. Cnsl notified by phone. (IH)

8/5/71 Hrg Mot: Ent procs: Marked exhbts. Ord deft's Mot to dismiss granted as to each and every defendant and each and every count of the Indict.

Ruth Linetsky – Counts 1 thru 36;

Lionel Perry – Counts 1 thru 36;

Linetsky Products, Inc. – Counts 1 thru 13, 16, 17, 19, 20, 21, 25, 28, 30, 31, 32, 34, 35 & 36;

Photo News Monthly, Inc. – Counts 14, 15, 18, 22, 23, 24, 26, 27, 29 & 33.

(All counts above shown as charged in the Indictment as being dismissed by Judge Irving Hill on this date.)

Cnsl for defts to prepare joint formal order with this case and case 7142-IH and submit same by 8/12/71. Any objections to be filed by 8/17/71. Transcript of procs will constitute Court's findings and conclusions unless cnls file separate findings and conclusions. (IH). Bond of each individual deft and corporations are exonerated. Md. JS-3 as to each individual deft & each corporate deft. (IH).

7/21/71 Fld notc re: dcmt withheld from case file

Fld notc re: dcmt withheld from case file

8/13/71 Fld Ord (IH) dismissing Indictments in both cases 7145 & 7142-IH as to all defendants so stated in said order and any bonds in said cases exonerated. Md. JS-3 as to all defts in said case. (IH).

(Original order in Case 7142-Cr).

Fld reporter's trans of prcdgs (partial) held 8/5/71.

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF CALIFORNIA

No. 7142IH

UNITED STATES OF AMERICA

v.

JAMES JOSEPH CARLO

PROCEEDINGS

12/22/70 Ent ord for flg Indict & for Issu of B/W & fxg bail at $1,000.00 C/S.

Fld Indict. Issd B/W. Md JS-2. (DWW)

Fld Ord (DWW) that bond originally set at $1,000.00 be reduced to $1,000.00 P/R.

12/28/70 Fld B/W retnd Exec as to deft Carlo.

1/18/71 Atty Joseph Taback is retnd for the deft. Fld design of cnsl. Deft Arr & T/N as chgd. Deft pleads Not Guilty to indict cts 1-11 Case asgd to cal of Judge Hill for all fur prcdgs, & cont to 2 p.m. this date for trial setting. Fld stmt of deft's constitutional rights. (DWW)

1/18/71 Trial Setting: Court ords case set for 4 day jury trial 4/13/71, 10 a.m. All mots to be fld by 3/8/71. Govt reply due 3/15/71, All mots to be ntcd for hrg 3/22/71, 1:30 p.m. Matter set on cal of 2/22/71, 3 p.m. for prelim P/T. Deft waives right to speedy trial. (IH)

2/22/71 Prelim pre-trial held: Cnsl for deft advises he may file mtn to dism. Ct & cnsl confer, Ord trial date of 4/13/71 stand. (IH)

3/8/71 Fld: deft's Mot for discvy, inspection & productn; Mot to hv govt list names of wits; Mot to produce evid inconsistent with guilt; Mot to produce all informers & wits; Mot for bill of parties; Mot to dism; affid of Joseph Taback in suppt of above

mots & Fld deft's Notc of all of above mots, retnble 3/22/71, 1:30 p.m. bef (IH).

3/16/71 Fld Govt's Combined Response and Opposition to Deft's Mots for Discovery Bill of articulars, To Dismiss the Indict; For Production of Informers & witnesses; For Disclosure of Witnesses Names and for Production of Exculpatory Evidence; Memo of pts & Authors.

3/22/71 Ent prcdgs: Fld affdvt of deft ref trial date & right to speedy trial. Ord trial date of 4/13/71 vacated. Deft's, mot to inspect G/J. minutes denied Govt cnsl agrees to furnish Jencks Act stmts 48 hrs prior to testimony. Deft's mot to dismiss deferred until ruling by Supreme Court in related cases. Govt cnsl to furnish deft's cnsl within 10 days copies of the material that is the basis of each count of the Indict. Govt cnsl to advise Court and deft's cnsl re: meaning of terms "obscene, lewd", etc. within 2 weeks etc. Ord govt cnsl advise defts' cnsl whether if any recipients of material subject of Indictment were minors. Deft's mot for bill of particulars is denied as to items 8, 9, 14 thru 25 and 29. All other aspects of deft's mots not specifically rules upon are either w/drawn or satisfied. Atty Fox to prepare formal order for the Court's sign and submit same approved as to form by deft's cnsl. Cnsl to advise Court when ruling in related cases is made. (IH)

4/21/71 Fld $1,000.00 P/R bond posted 12/23/70 bef U.S. Commr Weeks at L.A., Calif.

Fld notc of flg bond.

5/13/71 Ord deft's pending mot to dismiss calendared for hrg 6/10/71, 9:30 a.m. Cnsl for the moving parties will be allowed one hour to argue. Said hour to be allotted amongst the three cnsl in this case and the

two related cases as agreed. Govt cnsl to be allowed same time under same conds. Trial to be re-set after hrg on mot. (IH) Cnsl ntfd by phone and cyps mld to consl. (IH)

6/8/71 Fld Govt's Supplemental Response to Deft's Bill of Particulars.

6/10/71 Ent prcdgs: Ord deft's mot to dismiss denied. Fur Ord Deft's mot to dismiss regarding constitutionally protected expression set on cal of 7/30/71 for oral argument at 10:00 a.m. Deft shall have to and incl 6/30/71 to file any memos, etc., pltf's reply thereto due 7/20/71. Cnsl to file stip re: exbts to Indict by 6/15/71. (IH)

6/17/71 Fld Stip between Deft's cnsl & Pltf re: Exhibits.

7/1/71 Fld deft's pts & auths.

7/20/71 Fld Govt's Memo of Pts & Authorities: (1) Renewing Its Objection to the Proposed Hearing set for 7/30/71, On Additional Grounds; and, (2) Govt's Response, In Opposition, to Defts' Pts & Authors in Support of Comparative Samplars to be Tendered by Deft.

7/30/71 Upon Crt's own mtn, Ord fur hrg on deft's mtn to dismiss deferred until 8/5/71, 10 a.m. Cnsl ntfd by phone. (IH)

8/5/71 Hearing Motion: Ent procs: Marked exhbts. Ord deft's Mot to dismiss granted.

Cnsl for deft to prepare joint formal order with this case and case 7145-IH and submit same by 8/12/71. Any objections to be filed by 8/17/71. Transcript of procs will constitute Court's findings and conclusions unless cnsl file separate findings and conclusions. (IH).

Bond exonerated. Ent. 8/6/71. Md. JS-3 (IH).

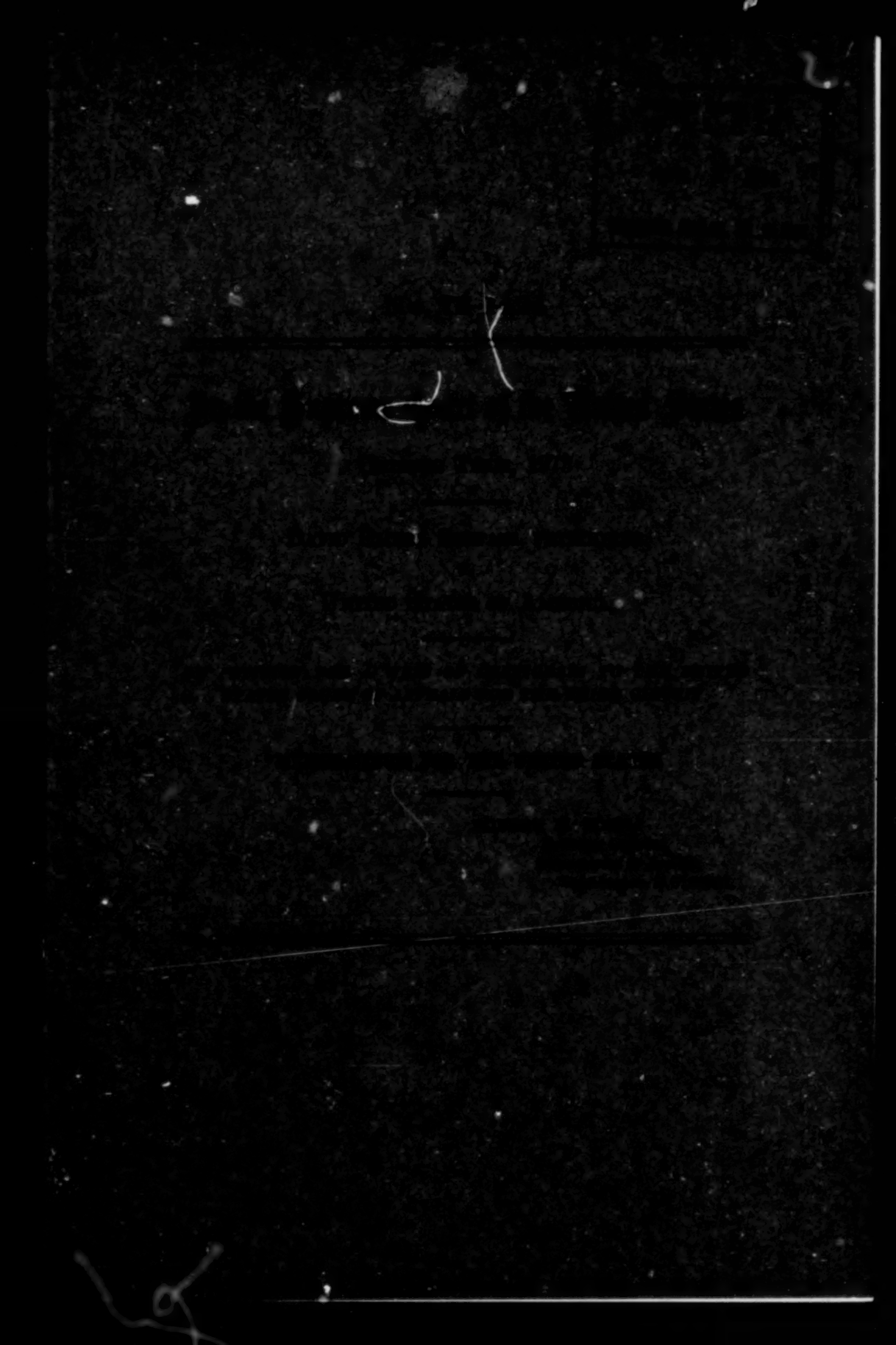
8/13/71 Fld Ord (IH) (Original order in Case 7142-IH), dismissing Indictments in both cases 7145 & 7142-IH as

to all defts so stated in said order and any bonds in said cases exonerated. Md. JS-3 as to all defts in said cases. (IH).

Fld reporter's trans of prcdgs (partial) held 8/5/71.

12/8/71 Upon appl of Atty Bennett B. Cohon, Ord that those dcmts attached to a stip of cnsl, fld 6/17/71, previously ord sealed by the Court, shall be unsealed & cys thereof made, and the Orig dcmts then shall be resealed. (IH)

1/17/72 Upon oral mtn of Atty George Lydon, ord exbt #E attached to a stip of cnsl fld 6/17/71 previously ord sealed by the Court, be unsealed and copy thereof made, and original then shall be resealed. (IH)



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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73–1424

DAVID EMERY SERFASS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES

QUESTION PRESENTED

Whether the United States may appeal from an order, entered prior to the empanelling of a jury, dismissing a criminal prosecution on the basis of the court's examination of records and affidavits setting forth the evidence to be adduced at trial, where the dismissal is alleged to be based on an erroneous interpretation of the applicable law.

STATEMENT

The facts of this case, which are not in dispute, are set out in the opinion of the court of appeals (App., *in-*

fra, pp. 14–16). In brief, petitioner was indicted by a grand jury sitting in the United States District Court for the Middle District of Pennsylvania. The indictment charged petitioner with failing to report for induction, in violation of 50 U.S.C. App. 462(a). Prior to trial, petitioner moved to dismiss the indictment on the ground that the order to report for induction was not issued validly. The district court granted this motion, relying on petitioner's selective service file, his affidavit in support of his motion and other material going to the validity of the order.

The United States filed a notice of appeal pursuant to the Criminal Appeals Act, 18 U.S.C. 3731, as amended by the Omnibus Crime Control Act of 1970 (84 Stat. 1890). The Act provides, in pertinent part:

> In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment or information as to any one or more counts, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution.
>
> * * * * *
>
> The provisions of this section shall be liberally construed to effectuate its purposes.

The court of appeals unanimously rejected petitioner's claim that it was without jurisdiction to hear the appeal and reversed the order of the district court on the merits. Speaking to the issue of appealability, the only issue raised by the petition for certiorari, the court of appeals found that cases construing the old Criminal Appeals Act to preclude an appeal in the circumstances here were inapposite. It held that

"[t]he 1971 amendment to § 3731 * * * was clearly intended to enlarge the Government's right to appeal to include all cases in which such an appeal would be constitutionally permissible" (App. infra, p. 18). Accordingly, it concluded that "[c]ases decided under the prior version of § 3731 are of little aid in determining appealability under the present version" (*ibid.*).

Moreover, relying on its earlier opinion in *United States* v. *Pecora*, 484 F. 2d 1289 (C.A. 3), the court of appeals also held that an appeal was not barred by the Double Jeopardy Clause. In the *Pecora* case, the court of appeals, discussing the appealability of a pretrial dismissal, held that "absent the defendant's waiver of his right to a jury trial pursuant to Rule 23(a) of the Federal Rules of Criminal Procedure, jeopardy does not attach until the jury has been impaneled and sworn" (*ibid*). Although *Pecora* involved a pretrial dismissal based upon a stipulated statement of facts "raising a legal issue," the court of appeals found that there was no meaningful distinction between the facts here and those in *Pecora* (App. *infra*, pp. 19–20):

> Although the instant dismissal was based upon the trial court's finding that the defendant had established a defense as a matter of law, rather than upon the finding as in *Pecora*, that there were insufficient facts as a matter of law to support a conviction, we see no significant constitutional difference between the two situations. Both involved a determination as to the legal sufficiency of certain facts, and in either case denial of the motion to dismiss entitled

the defendant to the jury trial which he has not waived. We therefore hold that jeopardy did not attach and the dismissal of the indictment in the instant case was an appealable order.

DISCUSSION

Petitioner claims that the order of the district court was not appealable and that the court of appeals erred in entertaining jurisdiction over the appeal.[1] He alleges that the construction of Section 3731, "as applied by the Third Circuit Court of Appeals in this case, has put the defendant, your petitioner, in jeopardy in violation of the clear import of the statute itself and the United States Constitution" (Pet. 5).[2] To the extent that petitioner's claim is based on the intent of Congress in amending the old Criminal Appeals Act, his argument is inconsistent with the language and legislative history of the present Act and has been rejected expressly or implicitly by every court of appeals that has decided the issue. On the other hand, there is a conflict among the courts of appeals over the issue whether the Double Jeopardy Clause bars an appeal from a pretrial order dismissing an indictment on the merits. Since resolution of this conflict is important to the administration of the federal criminal justice system, we believe the petition for certiorari should be granted.

[1] The petition is confined to the issue of appealability. Petitioner does not here contend that the district court's dismissal of the prosecution was legally correct.

[2] The page reference is to the typewritten copy of the petition for a writ of certiorari. References to the opinion of the court of appeals are to the Appendix to this memorandum, reproduced *infra* for the convenience of the Court.

A. THE LEGISLATIVE HISTORY OF THE CRIMINAL APPEALS ACT

In arguing that Section 3731 does not authorize an appeal in the circumstances of this case, petitioner relies erroneously on cases construing the old Criminal Appeals Act (18 U.S.C. (1964 ed.) 3731), which Congress expressly intended to overrule. Prior to the 1971 amendments, Section 3731 authorized an appeal to the court of appeals from "a decision or judgment setting aside, or dismissing any indictment * * * except where a direct appeal to the Supreme Court of the United States is provided by this section." This provision was generally construed as authorizing appeals to the court of appeals *only* from orders dismissing indictments which rested on a defect in the indictment or institution of the prosecution. The legislative history of former Section 3731, which was said to reflect a policy against permitting appeals in criminal cases by the United States, was cited as justification for ignoring what was acknowledged to be the plain language of the old Criminal Appeals Act. See, *e.g.*, *United States* v. *Apex Distributing Co.*, 270 F. 2d 747 (C.A. 9); *United States* v. *DiStefano*, 464 F. 2d 845, 847 (C.A. 2). Accordingly, it was held that an appeal did not lie to the court of appeals from pretrial orders dismissing indictments, when the district court had determined on the basis of stipulated or undisputed facts that there was a valid defense to the indictment, and also when the dismissal was for failure to prosecute or was predicated on the failure of the United States to comply with a discovery order. *United States* v. *Apex Distributing Co.*,

supra, 270 F. 2d at 751; *United States* v. *DiStefano, supra,* 464 F. 2d at 848; *United States* v. *Ponto,* 454 F. 2d 647 (C.A. 7 *en banc*); *United States* v. *Findley,* 439 F. 2d 970 (C.A. 1).

Since many of these orders could not be appealed directly to this Court under the provisions of former Section 3731 (cf. *United States* v. *Brewster,* 408 U.S. 501, 504–507), and since often, when such an appeal was possible, the issue was not of sufficient importance to justify review by this Court, Congress determined to amend Section 3731 to "assure that the United States may appeal [to the court of appeals] from the dismissal of a criminal prosecution by a district court in all cases where the Constitution permits." S. Rep. No. 91–1296, "Amendments to the Criminal Appeals Act" 91st Cong., 2d Sess., pp. 2–3.[3]

Congress took particular notice of the manner in which the old Criminal Appeals Act had been construed (*id.* at 5):

> Although the literal language of the present statute appears to authorize an appeal to a court of appeals whenever an indictment or information is dismissed, "* * * except where a direct appeal to the Supreme Court * * * is

[3] The amendments to the Criminal Appeals Act, which were enacted as part of Omnibus Crime Control Act of 1970, 84 Stat. 1890, were drafted by the Senate Judiciary Committee. They were adopted without change by the Senate, and were modified only by a clarifying amendment added in the conference committee (H. Conf. Rep. No. 91–1768, 91st Cong., 2d Sess., p. 21). The "well considered and carefully prepared" Senate Judiciary Committee Report is, therefore, particularly relevant in construing Section 3731. *Schwegmann Brothers* v. *Calvert Distillers,* 341 U.S. 384, 395–396 (Jackson, J., concurring).

> provided * * *," the statute has not been so interpreted. * * *
>
> * * * [T]he Criminal Appeals Act, as interpreted today, does not provide for an appeal by the United States to any court in a large variety of cases where the dismissal is based on grounds having nothing to do with any defect in the indictment, or the construction or invalidity of the underlying statute. For example, if a court issues an order for discovery, believed to be unauthorized, a court will dismiss the indictment if the prosecutor refuses to comply. There is at present no way the prosecution can test the validity of that dismissal and the underlying order. If a court dismisses an indictment for lack of timely prosecution under the Federal Rules, without finding a denial of the constitutional right to a speedy trial, the Government has no right to appeal. * * * Also, the statute, passed at a time when the range of Federal prosecutions was considerably narrower, fails to take into account the current necessity of reviewing administrative records in connection with a criminal prosecution—an outgrowth of the tremendous expansion of administrative agencies, particularly the establishment of the Selective Service System, since 1907. This has given rise to situations which do not readily fit into categories of pleadings recognized at the time the act was first passed.

Moreover, Congress indicated specifically its desire to provide for appeal in cases such as this (*id.* at 14):

> The problems of appealability have recently become especially serious in selective service cases where judges have reviewed defendants'

> selective service files before trials and dismissed the indictments after finding that there have been errors by the draft boards. *These are issues to be determined by a judge, not a jury, and there is no reason why they should not be subject to appellate review.* The question of whether actions such as those resulting in selective service case dismissals are appealable to courts of appeals, if appealable at all, is currently being litigated. If it should be decided that such appeals lie only to the Supreme Court, this will make it difficult for the Government to take appeals in a large number of selective service cases which ought to be reviewed, because such decisions often turn on special, narrow facts and thus are not sufficiently important to warrant an appeal to the Supreme Court. [Emphasis added.]

The Criminal Appeals Act, as amended, plainly carries out the expressed intention of Congress. Section 3731 now provides, in pertinent part:

> In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment or information as to any one or more counts, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution.

The Act contains no exception for appeals from dismissals on the merits that rest not upon the sufficiency of the indictment alone, but upon extraneous facts. In order to avoid just such a narrow reading of the new Act, similar to the interpretation that had been imposed upon the old Act by judicial gloss, Congress specifically directed in the new statute that

"[t]he provisions of this section shall be liberally construed to effectuate its purpose." [4]

In light of this background, every court of appeals which has construed the amended Section 3731 has concluded that an appeal by the United States will lie in all cases where the Double Jeopardy Clause permits it. *United States* v. *Jenkins,* C.A. 2, No. 73–1572, decided December 11, 1973; [5] *United States* v. *Martin Linen Supply Co.,* 485 F.2d 1143 (C.A. 5), certiorari denied, No. 73–743, February 19, 1974; *United States* v. *Esposito,* C.A. 7, No. 72–1825, decided June 12, 1973, certiorari denied, No. 73–432, January 7, 1974; *United States* v. *Walker,* 489 F.2d 1353 (C.A. 7); *United States* v. *Brown,* 481 F.2d 1035 (C.A. 8). Cf. *United States* v. *Southern Railway Co.,* 485 F.2d 309 (C.A. 4); *United States* v. *Rothfelder,* 474 F.2d 606 (C.A. 6), certiorari denied, 413 U.S. 922.

B. THE DOUBLE JEOPARDY CLAUSE

Relying on cases such as *United States* v. *McCreery,* 473 F.2d 1381 (C.A. 7), petitioner argues that an

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[4] The "explicit expression of this intent" was added "in view of the restrictive judicial interpretations of congressional intent which have resulted from the histories of the earlier versions of section 3731 despite strong indications in the debate on the 1907 act that it should be broadly interpreted" (S. Rep. No. 91–1296, *supra,* p. 18).

[5] In *United States* v. *Jenkins, supra,* Slip op. p. 700, Judge Friendly wrote:

"* * * Congress intended to extend the Government's right of appeal in criminal cases as far as it constitutionally could. If the language of the statute left any doubts on that score, they would be set to rest by the report of the Senate Committee on the Judiciary, 91st Cong., 2d Sess., No. 91–1296, at 4–13. The appeal here will therefore lie unless the Double Jeopardy clause prevents interference with appellant's acquittal * * *.

appeal is barred by the Double Jeopardy Clause because the order of dismissal is in effect the equivalent of a "judgment of acquittal." That approach, we submit, is erroneous.

The law is clear that jeopardy attaches so as to bar further prosecution only "when a jury has been selected and sworn." *Illinois* v. *Somerville,* 410 U.S. 458, 466; *United States* v. *Jorn,* 400 U.S. 470, 479–480; *Downum* v. *United States,* 372 U.S. 734; *Green* v. *United States,* 355 U.S. 184. Since the motion to dismiss in this case was made prior to the commencement of trial and before a jury had been selected, jeopardy had not attached, and further prosecution was not barred by the Double Jeopardy Clause.

The cases decided under provisions of the Criminal Appeals Act prior to the 1971 amendments are particularly apposite here. Section 3731, as it then read, authorized a direct appeal to this Court from a district court "decision or judgment sustaining a motion in bar, *when the defendant had not been put in jeopardy*" (18 U.S.C. (1964 ed.) 3731, emphasis added). The cases consistently held that appeals from pretrial orders dismissing indictments, which otherwise came within the technical definition of a motion in bar, were not barred by the "jeopardy" exception to Section 3731. See, *e.g., United States* v. *Celestine,* 215 U.S. 278, 283, holding that "[t]he defendant in this case had not been put upon trial, therefore he had not been put in jeopardy"; *United States* v. *Blue,* 384 U.S. 251, 253, holding that since the defendant "had not yet been brought to trial and put in jeopardy when dismissal occurred * * * our jurisdiction under the statute is secure * * *." Accord: *United States* v. *Murdock,* 284 U.S. 141; *United States* v. *Halseth,* 342 U.S. 277; *United States* v. *Covington,* 395 U.S. 57, 59, n. 2. Cf. *United States* v. *Brewster, supra,* 408 U.S. at 506.

The effect of these decisions cannot be avoided simply by attaching the label of an "acquittal" to the pretrial dismissal of the indictment, as was done in *United States* v. *McCreery, supra,* 473 F. 2d at 1382. The Double Jeopardy Clause protects a defendant from being "twice put in jeopardy" for the same offense and not from appeal after an "acquittal." Here, the district court dismissed the indictment before trial and before jeopardy attached.[6] The mere fact that the district judge, in deciding the pretrial motion, considered facts that could also be considered during a trial on the merits does not convert the hearing and determination of a pretrial motion into a trial subjecting the defendant to jeopardy.[7] The

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[6] In *United States* v. *Wilson,* C.A. 3, No. 73–1444, decided January 15, 1974, the court of appeals held that a judgment of dimissal, entered after a verdict of guilty, on the ground of preindictment delay, was an "acquittal". It further held that an appeal was barred by the Double Jeopardy Clause even though the only relief sought on appeal was not a retrial, but an order directing the entry of a judgment of conviction. In its opinion below, the court of appeals distinguished this case from its decision in *Wilson* on the ground that the order of dismissal here was entered before jeopardy had attached (App., *infra,* p. 19, n. 1).

The petition for certiorari filed by the United States in the *Wilson* case (No. 73–1395) raises the issue, which is related to that in the instant case, whether an appeal from a post-conviction dismissal is barred by the Double Jeopardy Clause.

[7] This conclusion is especially evident where, as in the present case, neither the defendant nor the government waived the right to a trial of the merits before a jury. See Rule 23(a), Fed. R. Crim. P.; *Singer* v. *United States,* 380 U.S. 24.

crucial distinction between such a pretrial proceeding and a trial before a jury (or a judge, where a jury has been waived) is that the district court, ruling on a pretrial motion to dismiss, has no power to enter a guilty verdict. Accordingly, a defendant is never in jeopardy of conviction during this stage of the case.

Although we believe it is evident that the Double Jeopardy Clause does not bar an appeal in these circumstances, there is a clear conflict among the courts of appeals. The order of the district court here would *not* be appealable under the holdings of the courts of appeals for the Fourth, Sixth and Seventh Circuits. *United States* v. *King*, 474 F. 2d 1343 (C.A. 4), certiorari denied, 413 U.S. 922; *United States* v. *Southern Railway Co.*, 485 F. 2d 309 (C.A. 4); *United States* v. *Rothfelder*, 474 F. 2d 606 (C.A. 6), certiorari denied, 413 U.S. 922; *United States* v. *McCreery*, 473 F. 2d 1381 (C.A. 7); *United States* v. *Ponto*, 454 F. 2d 657 (C.A. 7, *en banc*). It *would* be appealable under the holdings of the courts of appeals for the Second, Fifth, and Eighth Circuits. *United States* v. *Velazquez*, 490 F. 2d 29 (C.A. 2)[8]; *United*

[8] Although an order of dismissal of the kind entered here would be appealable under the holding of Court of Appeals for the Second Circuit in *Velazquez*, that case held other pretrial dismissal orders, which have been held to be appealable by other courts of appeals, not to be appealable. For example, contrary to the decisions in *United States* v. *Walker*, 489 F. 2d 1353 (C.A. 7), and *United States* v. *Pecora*, 484 F. 2d 1289 (C.A. 3), the Second Circuit in *Velazquez* stated that a pretrial order dismissing an indictment on the basis of a stipulated set of facts would not be appealable. (490 F. 2d at 34).

States v. *Martin Linen Supply Co.*, 485 F. 2d 1143 (C.A. 5), certiorari denied, No. 73-743, February 19, 1974; *United States* v. *Brown*, 481 F. 2d 1035, 1041 (C.A. 8).

CONCLUSION

The petition for certiorari should be granted to resolve this conflict,[9] which affects not only selective service cases, but all cases in which the district court finds it convenient to dispose of affirmative defenses prior to trial.[10] "Otherwise the courts and the parties must [continue to] expend great energy, not on the merits of dispute settlement, but on simply deciding whether a court has the power to hear a case." *United States* v. *Sisson*, 399 U.S. 267, 307.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

APRIL 1974.

[9] Since last June, where our petitions for writs of certiorari in *United States* v. *Rothfelder*, *supra*, and *United States* v. *King*, *supra*, were denied, the conflict among the courts of appeals, which we suggested was then emerging, has fully blossomed.

[10] See, *e.g.*, *United States* v. *Martin Linen Supply Co.*, *supra*, (pretrial dismissal of criminal contempt petition in an anti-trust case); *United States* v. *Southern Railway Co.*, *supra*, (pretrial dismissal of information charging violation of Elkins Act); *United States* v. *Pecora*, *supra*, (pretrial dismissal of indictment charging violation of Labor-Management Relations Act); *United States* v. *Hill*, 473 F. 2d 759 (C.A. 9) (pretrial dismissal of indictment in an obscenity case).

APPENDIX

United States Court of Appeals for the Third Circuit

No. 73-1736

UNITED STATES OF AMERICA, APPELLANT

v.

DAVID EMERY SERFASS

(D.C. Criminal No. 15229)

Appeal From the United States District Court
for the Middle District of Pennsylvania

Submitted Under Third Circuit Rule 12(6)
December 19, 1973

Before VAN DUSEN, ALDISERT and ROSENN, Circuit Judges

JAMES W. WALKER, ESQUIRE
for appellant.

HARRY A. DOWER, ESQUIRE
BOYD G. HIXSON, ESQUIRE
DOWER, MACKSON, HAUFF & HETTINGER
for appellee.

OPINION OF THE COURT

(Filed February 20, 1974)

ROSEN, Circuit Judge

This appeal is hopefully one of the last of a long series of selective service cases involving the issue of whether an order to report for induction was invalid for failure of the local board to reopen the registrant's classification pursuant to a post-induction order request for conscientious objector status. Since the district court of the Middle District of Pennsylvania dismissed the indictment, the defendant also raises on appeal the issue of double jeopardy. Because we find the order of dismissal is appealable, and the dismissal was improper in light of the subsequent decision in *Musser* v. *United States*, 42 U.S.L.W. 3286 (U.S. November 13, 1973), we reverse.

The facts of this case are not in dispute. On November 16, 1970, Serfass was ordered by his local board to report for induction on December 1. He appeared on December 1 and requested a delay in his induction in order that he could submit additional medical evidence. The delay was granted, but on December 18 he was again ordered to report for induction, this time on January 18, 1971. On December 29, he visited his local board and requested the form for conscientious objector application, SSS-150. His form 150 was returned to the local board on January 8, and on January 13 he received a courtesy interview as he had requested. By letter dated January 14, the board notified him that it had considered his entire file and "unanimously agreed that there was no change over which you had no control and decided not to re-open your file." The board also informed him that he was still obligated to report for induction on January 18. No other reasons for the refusal to reopen his file were given. On January 18, Serfass appeared at the examining station and refused induction. This prosecution followed under 50 App. U.S.C. § 462.

Before trial, Serfass moved for dismissal of the indictment on the ground that the local board had denied him due process by inadequately setting forth its reasons for denying his request to reopen his classification and to grant him conscientious objector status. The district court granted this motion, relying on defendant's selective service file, his affidavit in support of his motion which set forth that he had applied for conscientious objector status and had received from his local board only the January 14 letter denying his claim, and a stipulation of counsel that the information he sent to the board set forth a prima facie conscientious objector claim based upon late crystallization of beliefs.

On the basis of the law prevailing in this Circuit at that time, the district court stated in its opinion:

> The enumerated facts indicate clearly that Serfass is entitled to full consideration of his claim prior to assignment to combatant training and service. *Ehlert* v. *United States,* 1971, 402 U.S. 99, 103–04 & n. 7, 107. Therefore, since the statement of reasons given for refusing to reopen is sufficiently ambiguous to be reasonably construed as a rejection on the merits, thereby prejudicing his right to in-service review, defendant's motion to dismiss the indictment will be granted. [Footnotes omitted.]

The footnotes indicate that the court relied primarily upon *United States* v. *Ziskowski,* 465 F. 2d 480 (3d Cir. 1972), and *United States* v. *Folino,* No. 72–1974 (3d Cir. June 29, 1973).

I

We first consider defendant's contention that we have no jurisdiction to hear this Government appeal from the district court's dismissal of the indictment. Resolution of this contention turns upon our construction of the Criminal Appeals Act, 18 U.S.C. § 3731, which reads:

> In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment or information as to any one or more counts, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution.
>
> * * * * *
>
> The provisions of this section shall be liberally construed to effectuate its purposes.

This version of the Act is applicable to all actions begun in any district court after January 2, 1971, (84 Stat. 1890, 1893) and therefore applies to the present action.

Actions brought prior to January 2, 1971, were governed by an earlier version of the Criminal Appeals Act, the relevant portion of which made a criminal case appeal by the United States to the court of appeals:

> [f]rom a decision or judgment setting aside, or dismissing any indictment or information, or any count thereof, except where a direct appeal to the Supreme Court is provided by this section.

See United States v. *Pack,* 247 F. 2d 168 (3d Cir. 1957).

Under this former version of the Act it is clear that no appeal by the United States would lie in the instant case. Appeals were permissible only if the dismissal of an indictment was based upon a defect in the indictment or in the institution of the prosecution, rather than upon evidentiary facts outside the face of the indictment which would possibly constitute a defense at trial. *See, e.g., United States* v. *Ponto,* 454 F. 2d 657, 663 (7th Cir. 1971) (en banc);

United States v. *Findley,* 439 F. 2d 970 (1st Cir. 1971).

The 1971 amendment to § 3731, however, was clearly intended to enlarge the Government's right to appeal to include all cases in which such an appeal would be constitutionally permissible. Cases decided under the prior version of § 3731 are of little aid in determining appealability under the present version. *See United States* v. *Pecora,* 484 F. 2d 1289 (3d Cir. 1973).

In *Pecora,* we held appealable under the present version of § 3731 the district court's pretrial dismissal of an indictment based upon a stipulation of the facts upon which the indictment was returned.

In discussing the appealability of the pretrial dismissal, we indicated that absent the defendant's waiver of his right to a jury trial pursuant to Rule 23(a) of the Federal Rules of Criminal Procedure, jeopardy does not attach until the jury has been impaneled and sworn. We held that entering into the stipulation of facts "for the purpose only of attacking the validity of the indictment did not constitute the waiver necessary under Rule 23(a)." Therefore, we concluded, since jeopardy had not attached at the time of the pretrial dismissal of the indictment, the Government could appeal the dismissal. *United States* v. *Pecora,* 484 F. 2d at 1292–93. We also rejected as inconsistent with § 3731 the contention that our holding would discourage defense counsel from expediting procedure by making pretrial motions for dismissal, and instead encourage counsel to wait until the jury was sworn before making motions for dismissal. 484 F. 2d at 1289. *See* Fed. R. Crim. Proc. 12(b).

We believe the instant appeal is squarely controlled by *United States* v. *Pecora, supra.* As in *Pecora,* the

pretrial motion of dismissal was based upon undisputed facts raising a legal issue and the defendant did not waive his right to a jury trial.[1]

Although the instant dismissal was based upon the trial court's finding that the defendant had established a defense as a matter of law, rather than upon the finding, as in *Pecora,* that there were insufficient facts as a matter of law to support a conviction, we see no significant constitutional difference between the two situations. Both involved a determination as to the legal sufficiency of certain facts, and in either case denial of the motion to dismiss entitled the defendant to the jury trial which he has not waived. We therefore hold that jeopardy did not attach and the dismis-

---

[1] The district court in this case expressly found that the defendant did not waive his right to a jury trial. Not only were none of the procedures required by Rule 23(a) complied with, but attached to the motion to dismiss the indictment was a motion to postpone the trial until after the disposition of the motion on the merits. *Cf. United States* v. *Wilson,* 73–1444 (3d Cir., filed January 15, 1974) (opinion sur denial of panel rehearing) (*post-trial* directed verdict of acquittal).

Pecora distinguished *United States* v. *Hill,* 473 F. 2d 759 (9th Cir. 1972), which held unappealable the district court's pretrial dismissal of an indictment alleging the mailing of obscene advertisements. The dismissal was on the ground that the stipulated materials were not legally obscene. *Hill* was distinguished on two grounds. First, the Court of Appeals in *Hill* did not determine whether the defendant had waived his right to a jury trial. Second, in *Hill* "evidence was actually entered into the record. The district court determined the character of that evidence so it may be said that jeopardy had attached." We do not consider this second distinction between *Pecora* and *Hill* to permit our holding the instant order unappealable. To the extent that *Pecora* and *Hill* may be inconsistent, we are of course bound by *Pecora.*

sal of the indictment in the instant case was an appealable order.[2]

II

Our consideration of the merits of the Government's appeal requires a cursory review of the line of cases in this circuit upon which the district court's dismissal of the indictment was based. At all pertinent times, the post-induction order reopening of a registrant's selective service classification by his local board was governed by Regulation 1625.2, 32 CFR § 1625.2, which provided that,

> [T]he classification of a registrant shall not be reopened after the local board has mailed to such registrant an Order to Report for Induction * * * unless the local board *first specifically finds* there has been *a change in the registrant's status resulting from circumstances over which the registrant had no control.*[3] [Emphasis supplied.]

In *Ehlert* v. *United States*, 402 U.S. 99 (1971), a registrant who had submitted a post-induction order

[2] *Accord: United States* v. *Martin Linen Supply*, 485 F. 2d 1143 (5th Cir. 1973); *United States* v. *Brown*, 481 F.2d 1035 (8th Cir. 1973).

Contra: United States v. *Southern Railway Company*, 485 F.2d 309 (4th Cir. 1973); *United States* v. *Rothfelder*, 474 F.2d 606 (6th Cir.), *cert. denied*, 413 U.S. 922 (1973); *United States* v. *McCreery*, 473 F.2d 1381 (7th Cir. 1973).

See also: United States v. *Hill*, 473 F.2d 759 (9th Cir. 1972), distinguished by this court in *Pecora*. See note 1 *supra*.

[3] Regulation 1625.2, 32 CFR § 1625.2 in pertinent part provided:

"The local board may reopen and consider anew the classification of a registrant * * * upon the written request of the registrant * * * if such request is accompanied by written information presenting facts not considered when the registrant was classified, which, if true, would justify a change in the registrant's classification; * * * provided, * * * the classification of a registrant shall not be reopened after the local board

(Continued)

conscientious objector claim refused induction after being notified by his local board that,

> [I]t had declined to reopen his classification because the crystallization of his conscientious objection did not constitute the "change in the registrant's status resulting from circumstances over which the registrant had no control" required for post-induction notice reopening.

402 U.S. at 100. The Supreme Court affirmed the ensuing conviction, rejecting the registrant's claim that crystallization of conscientious objection is a circumstance over which he had no control. While agreeing that the language of the regulation was "not free from doubt," the Court regarded as controlling the Government's "plausible" and "consistently urged" interpretation that the regulation only applied to "objectively identifiable" and "extraneous" circumstances, 402 U.S. at 104, and that reopening was not required for a change in beliefs.

Furthermore the Court held this interpretation to be a valid timeliness rule, since the military already had procedures for handling in-service conscientious objector claims, and post-induction order claims could legitimately be decided by the military forum as long as claimants were not subject to combatant training or service until their claims had been acted upon.

The Court held, however, that "a 'no man's land' would be intolerable," 402 U.S. at 104 n. 7, and a conscientious objector claimant must be given some opportunity to have his claim heard on the merits,

(Continued)
has mailed to such registrant an Order to Report for Induction (SSS Form No. 252) * * * unless the local board first specifically finds there has been a change in the registrant's status resulting from circumstances over which the registrant had no control."

either by his local board or by the military, whenever the change in his beliefs occurred. The Court therefore felt obligated to look at existing military procedures to determine whether the requirement that all claimants receive some forum to present their claims was met in practice. Although recognizing that the "somewhat inconsistent" military regulations "contained formulations seeming to look the other way," 402 U.S. at 106,[4] the Court relied upon a letter written by the General Counsel of the Army which stated that present practice, as well as practice when the registrant had been ordered to report for induction, permitted presentation to the military of such post-induction order conscientious objector claims, and that there was no possibility that late crystallizers would find themselves without a forum in which to present their claims. The Court accepted this statement, warning that if a situation should arise "in which neither the local board nor the military had made a full opportunity to present a prima facie conscientious objector claim for determination under established criteria, * * * a wholly different case would be presented." 402 U.S. at 107. The Court concluded by stating that,

[4] The Court cited Army Regulation No. *635-20*, ¶ 3:

"a. Consideration will be given to requests for separation based on bona fide conscientious objection to participation in war, in any form, when such objection develops subsequent to entry into the military service.

"b. Federal courts have held that a claim to exemption from military service under Selective Service laws must be interposed prior to notice of induction, and failure to make timely claim for exemption constitutes waiver of the right to claim * * * Requests for discharge after entering military service will not be favorably considered when—

"(1) Based on conscientious objection which existed, but which was not claimed prior to notice of induction, enlistment or appointment."

> [W]e hold that the Court of Appeals did not misconstrue the Selective Service regulation in holding that it barred presentation to the local board of a claim that allegedly arose between mailing of a notice of induction and the scheduled induction date.

402 U.S. at 107–108.

United States v. *Shomock,* 462 F. 2d 338 (3d Cir. 1972), raised the question of whether *Ehlert* had overruled our decision in *Scott* v. *Commanding Officer,* 431 F. 2d 1132 (3d Cir. 1970), and this court answered in the negative. The registrant had filed a post-induction order conscientious objector claim and had refused induction after being informed by the local board that the information he had submitted did not warrant reopening of his classification.

This court reversed the ensuing judgment of conviction. First, we held, under *Scott* the local board was obliged to inform the registrant of the basis for its denial of his claim, whether it was for "lack of jurisdiction or some other technical reason or was a decision based on the merits of Shomock's claim." 462 F. 2d at 346. Furthermore, we held, *Ehlert* did not compel a different result because in the case at hand there was doubt that the registrant would in fact have received a full and fair hearing by the military of his conscientious objector claim. First, this court feared that the military might rely on AR 635-20 ¶ 3(b)(2),[5] not cited in *Ehlert,* to deny the registrant

[5] AR 635-20, ¶3(b) provides:

"* * * Requests for discharge after entering military service will not be favorably considered when—

* * * * *

"(2) Based solely on conscientious objection claimed and denied by the Selective Service System prior to induction."

This provision is quoted in *United States* v. *Ziskowski,* 475 F. 2d 480, 485 (3d Cir. 1972).

an in-service hearing on the merits of his claim on the ground that his claim had already been denied by the local board prior to induction.

Second, we noted that AR 635–20 ¶ 3(b)(1) at the time the registrant had refused induction and until August 15, 1970, precluded on its face in-service review of conscientious objector claims which arose before induction, even if the claim arose after the registrant had received his induction notice.[6] This court therefore did not consider persuasive a letter addressed to it by the General Counsel of the Department of the Army which apparently relied upon the *amended* version of ¶ 3(b)(1), cited in *Ehlert*. The letter stated that Army practice was to permit in-service review of post-induction order conscientious objector claims which had been denied by a local board solely because of late crystallization of beliefs.[7]

[6] The provision had read as follows:

"* * * Requests for discharge after entering military service will not be favorably considered when—

"(1) Based solely on conscientious objection which existed but was not claimed *prior to induction*, enlistment, or entry on active duty for training." [Emphasis supplied.]

On August 15, 1970, the emphasized language was amended to read "prior to notice of induction." The amended version was quoted *Ehlert*. *See* note 4 *supra*.

[7] The relevant portions of the letter asserted the following:

"If the appellant had entered the Army in May 1969 under circumstances where the Selective System actually considered and denied his conscientious objector claim on the merits, he would not have been entitled to an in-service determination on the merits of his conscientious objector claim.

"If the appellant had entered the Army in May 1969 under circumstances where his local draft board merely refused to reopen his classification because his asserted views crystallized subsequent to the receipt of his induction notice, in the view of the Department of the Army personnel responsible for administering the conscientious objector claims of in-service members, he would have been entitled under Army policy to an in-service determination on the merits of his conscientious objector claim."

462 F. 2d at 345 n. 17.

For both of these reasons, the military might have refused to consider the registrant's claim on the merits, even though the local board might have rejected his claim by relying solely upon *Ehlert* without reaching the merits of his claim. There was a strong possibility, therefore, that the registrant had been placed in the "no man's land" condemned by *Ehlert*, with no opportunity to have his post-induction order conscientious objector claim considered on the merits. His induction order was therefore held invalid.

The same issue was presented in *United States* v. *Ziskowski*, 465 F. 2d 480 (3d Cir. 1972). The registrant had filed a post-induction order conscientious objector claim, and in response had received, following an interview, a letter stating that,

> It is the determination of the board that there has been no change in your status resulting from circumstances over which you had no control. Your classification has not been reopened.

465 F. 2d at 481. On the authority of *Scott*, *supra*, this court reversed the ensuing conviction for refusing induction. We distinguished *Ehlert* by noting that the local board in that case had indicated that its refusal to reopen the registrant's classification was based on its finding that crystallization of conscientious objector beliefs was not a circumstance over which the registrant had no control. In the case before the court, however, it was not clear whether the denial was for this reason or for any one of several other reasons. *See* 465 F. 2d at 482–483.

Moreover, this court found "substantial support" for this result from *Ehlert* itself. Relying on AR 635–20 ¶3(b)(2),[8] not cited in *Ehlert*, the court reasoned that even if the military interpreted that regulation to bar only in-service review of claims which had been denied *on the merits* by a local board,[9] the military might reasonably have construed the Board's action as to Ziskowski as having been a determination on the merits precluding in-service review. Therefore Ziskowski would have been in the "no man's land" which had been disapproved by *Ehlert*. The local board might have denied his claim for procedural reasons, while the military, interpreting the local board's denial as having been on the merits, might have then refused to consider his claim.

In *United States* v. *Folino*, No. 72–1974 (3d Cir., June 29, 1973), this court reversed a selective service conviction on the authority of *Ziskowski*.

The Supreme Court appears to have placed an abrupt end to this line of cases, however, by its recent per curiam decision in *Musser* v. *United States*, 42 U.S.L.W. 3286 (U.S. November 13, 1973). That case involved the consolidated appeal by two selective service registrants who had been convicted for refusing induction after having their post-induction order conscientious objector claims rejected by their local boards. One registrant had received a letter from his board stating that the board "did not specifically find there has been a change in status resulting from circumstances over which you had no control." The other registrant had received a letter stating simply that the board "found no ground for reopening your classification."

[8] *See* note 5 *supra*.

[9] As noted in *Ziskowski*, this interpretation was later adopted explicitly. 465 F.2d at 485 n.12.

Petitioners relied upon *Ziskowski*, *Shomock*, and *United States* v. *Alioto*, 469 F. 2d 722 (1st Cir. 1972), a similar case. The Supreme Court flatly rejected the reasoning of these cases. In answering the argument that the military might consider the local board's refusal to reopen to have been on the merits when it was in fact procedural, the Court stated that *Ehlert* had held that a local board was "without power" to rule on the merits of a post-induction order conscientious objector claim, and

> [f]rom this it follows that in no event can a mere refusal to reopen signify more than a recognition of lack of power to do so; it cannot and does not bear any significance as to the merits of a registrant's claim.
>
> * * * * *
>
> [N]o matter what the board's apparent motivations in refusing to reopen the petitioner's classification may have been, the boards were simply without power to reopen, and an expressed or unexpressed indication of the board's views of the claims cannot be deemed a denial of those claims on the merits.

As in *Ehlert*, the Court then turned "to a consideration of whether 'the conditions for the validity of such a rule * * * are met in practice.'" The Court noted AR 635–20, ¶3(b)(2), which seemed to bar in-service review of a claim which had been "claimed and denied" before induction.[10] The Court stated that,

> While the critical word "denied" might arguably be applied to a board's refusal to reopen a classification, it cannot be so applied to a refusal to reopen a classification based on a claim of conscientious objection crystallizing after issuance of a notice to report, now that Ehlert had made clear that such a refusal can only

[10] *See* note 5 *supra*.

> be based on the board's lack of power to reopen in such a posture.

The Court also relied upon the letter written by the General Counsel of the Department of the Army which we had considered in *Shomock*,[11] and which stated that when a refusal to reopen by a local board is not based on the merits, the registrant could receive a full in-service hearing on the merits. The Court concluded that,

> In the event that a local board in one way or another manifests its views as to the sincerity of late-crystallizing registrants' claims, such expressions must be given no effect by the armed forces in reviewing an in-service conscientious objection request.

Mr. Justice Douglas, in dissent pointed out that "[t]he opinions summarily affirmed today conflict squarely, as the Solicitor General concedes, with decisions in the First, Second, and Third Circuits." Included in the list of cases that follows this statement are *Shomock, Ziskowski,* and *Folino.* We agree that these three cases are inconsistent with *Musser* and for that reason are no longer the law.

Musser was decided after the district court dismissed the indictment in this case, and of course long after Serfass himself refused induction. We must therefore decide whether *Musser* is to be applied retroactively to registrants who refused induction before the case was decided.

We have no hesitation in answering this question in the affirmative. *Musser* did not announce any new principle of law. Rather, the case, by relying on indications of military policy which were already before us in *Shomock* and *Ziskowski,* held that our interpretation of military policy in those cases was incorrect;

[11] *See* note 7 *supra.*

there was no danger that the registrants whose convictions we had reversed would have found themselves in a "no man's land."

Furthermore, the two registrants whose convictions were affirmed in *Musser* had refused induction in February 1969 and January 1971, respectively. Serfass, as noted, refused induction in January 1971. *Musser* appears to hold, therefore, that even at the time Serfass refused induction, he would have been permitted by military policy to obtain an in-service review of his conscientious objector claim. He therefore cannot justify his refusal of induction on the ground that he faced the "no man's land" of *Ehlert,* even though his local board did not explain why it had denied his conscientious objector request.[12]

The order of the district court granting the motion to dismiss the indictment will be reversed. The case will be remanded to that court for trial or other proceedings consistent with this opinion.

A True Copy:
Teste:
Clerk of the United States Court of Appeals for the Third Circuit.

[12] *Ehlert* was decided on April 21, 1971. Serfass refused induction after *Scott* but before *Ehlert.* The Court in *Musser* implicitly held *Ehlert* retroactive, however, since it interpreted *Ehlert* as requiring the affirmance of two convictions for refusing induction, even though both acts had taken place before *Ehlert* was decided.

We note that since neither conviction affirmed by the Court in *Musser* involved a refusal of induction in a circuit in which the prevailing case law was at the time clearly contrary to *Ehlert,* the Court did not necessarily decide whether actual good faith reliance on pre-Ehlert case law might negate the element of willfulness necessary to sustain a conviction. *See, e.g., United States* v. *Mercado,* 478 F. 2d 1108 (2d Cir. 1973).

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No. 73-1424

In the Supreme Court of the United States

OCTOBER TERM, 1973

UNITED STATES OF AMERICA

v.

DAVID EMERY SERFASS, PETITIONER

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The Opinion of the Court of Appeals (A. C) is reported at 492 F. 2d 388. The Opinion of the District Court (A. A) is unreported.

JURISDICTION

The Judgment of the Court of Appeals was entered on February 20, 1974. The Petition for a Writ of Certiorari was docketed on March 22, 1974, and was granted on April 22, 1974 (A. M). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTION PRESENTED

Does an Appeal by the Government from the pre-trial dismissal of an indictment based on a full review of the Government's evidence put the defendant in double jeopardy?

STATUTES AND RULES INVOLVED

United States Constitution, Fifth Amendment provision:

> ". . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; . . .";

and

18 U.S.C. 3731 provides in pertinent part:

> "In a criminal case an appeal by the United States shall lie to a Court of Appeals from a decision, judgment, or order of a District Court dismissing an indictment or information as to any one or more counts, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits its further prosecution. . . .
>
> "The provisions of this Section shall be liberally construed to effectuate its purposes."

STATEMENT

Petitioner had been ordered to report for induction into the Armed Forces of the United States on December 18, 1970. The induction was to have taken place on January 18, 1971.

David [illegible]. Serfass was a member of the Peace Corps and was serving on Panape, a remote Pacific island. Among other things he was engaged in training a native as a superintendent of construction to build, repair, and maintain, an air-strip and a road on this small island. His military service had been deferred for two years while he was performing this service in the interest of the United States. Shortly before the conclusion of his two years of service in the Peace Corps he was requested to stay in Panape a few more months to complete the training of the native superintendent. He agreed to stay and notified his Draft Board of this change. He was ordered to take his pre-induction physical examination at an United States Army installation in Guam, and as a consequence of events over which he had no control, and a substantial amount of bureaucratic red-tape, and no available transportation, he could not get to Guam. He was then ordered by his Draft Board to report for transportation for induction at the Salvation Army headquarters in Allentown, Pennsylvania; he was required to be there at 5:00 A.M. on December 18, 1970. He did everything but swim from Panape and arrived in Allentown at 2:00 A.M., and three hours later stood in line at the Salvation Army waiting to board a bus to go to the induction center in Wilkes-Barre, Pennsylvania. He went to the induction center but was found to be afflicted with amoebic dysentery, was sent home, and was rescheduled to be inducted on January 18, 1971.

On December 29, 1970 your Petitioner requested a special form for conscientious objectors (Form SSS–150). (Selective Service File, pages 74, 75.) His Local Board, Local Board No. 89, of Pennsylvania, then received the completed Form 150 from the Petitioner, who requested a courtesy interview on January 11, 1971, and received such on January 13, 1971. (Selective Service File, pages 77, 78-97.) The Local Board considered his entire file at a meeting on January 13, 1971 and on January 14, 1971, Petitioner was informed that the Board unanimously agreed "that there was no change over which the [Petitioner] had no control." On this basis, the Board decided not to reopen his file. (Selective Service File, page 103.) The Petitioner then refused induction at the examining station in Wilkes-Barre, Pennsylvania, on January 18, 1971. (Selective Service File, 118.) Petitioner was thereafter indicted on October 10, 1972, the indictment being for a violation of 50 U.S.C. App. 462(a). At the arraignment, Petitioner pleaded "Not Guilty" and a trial date was set. A Motion to Dismiss the Indictment was filed, (A. D) along with a supporting affidavit (A. E). The Briefs of the Government and your Petitioner were submitted and an argument on the Motion to Dismiss was held before Judge Michael Sheridan, Chief Judge, United States District Court for the Middle District of Pennsylvania, at which time there was also an oral stipulation of counsel, relating to the fact that Petitioner had made out a prima facie case for

conscientious objector status. Shortly thereafter, and before decision, the entire Selective Service File of the Petitioner, at the request of Judge Sheridan and mutual consent of Serfass and the Government, was submitted to the Judge (A. J&K).

In an Opinion filed July 16, 1973, Judge Sheridan granted the Petitioner's Motion to Dismiss the Indictment. (A. L) The Court, noting that the material facts had been derived from Petitioner's Affidavit in Support of the Motion to Dismiss, the entire Selective Service File, and from Admissions of Counsel during the oral argument on the question, held that the statement of reasons given by the Draft Board was sufficiently ambiguous to be reasonably construed as a rejection on the merits which would prejudice your Petitioner's right to in-service review and, therefore, granted the Motion to Dismiss.

The United States filed a timely Motion of Appeal to the Third Circuit Court of Appeals seeking a review of the District Court's Order dismissing the Indictment. The Government in its Brief stated that jurisdiction was based on 18 U.S.C. 3731, as well as arguing on the merits. Petitioner's Brief contended that the Order of the District Court dismissing the indictment was not an appealable order and that the Circuit Court of Appeals, therefore, did not have jurisdiction to hear the Appeal as the Petitioner would then be put twice in jeopardy. (The main thrust of the argument in both cases was on the merits.) The Court of Appeals held, after dispensing with oral argument, that jeopardy had not yet attached and, therefore, dismissal of the indictment in the instant case was an appealable order, and went on to decide the merits of the Government's Appeal, reversing the decision of the lower court and remanding to the District Court for trial. (A. C)

SUMMARY OF ARGUMENT

Petitioner argues that the Government does not have the right to appeal under the Criminal Appeals Act, 18 U.S.C. 3731 for the reason that he is put in double jeopardy by virtue of

that appeal. It is contended specifically that appeal by the United States is barred by prior jeopardy when the District Court grants a pre-trial Motion to Dismiss, relying on facts outside the indictment, these facts being derived from the defendant's affidavit in support of his motion, his entire Selective Service File, and from a Stipulation of Counsel at Oral Argument on the Motion to Dismiss, such Order by the District Court being the functional equivalent of an acquittal on the merits.

In support of this position, Petitioner argues that the double jeopardy provision of the United States Constitution should not be applied with the use of mere technicalities. Specifically, it is argued that although the general principle as to whether or not jeopardy has attached revolves around the question as to whether or not jury trial has either been waived and the court has begun to hear evidence or the jury has been impaneled and sworn, this is only a presumption. Petitioner further argues that because of the fact that the dismissal of the indictment was the functional equivalent of an acquittal on the merits, that constructively, jeopardy had attached.

This position is made particularly forceful in light of the fact that the Court considered all the evidence that the Government had to present. It is argued that because of this, it would be exalting form over substance to allow an appeal in a situation where a second prosecution would be clearly barred. In this vein, it is clear that the Government did not have to enter into a stipulation nor did it even have to assent to a hearing on the Motion to Dismiss. It is suggested that both Petitioner and the Government were concerned with the elimination of unjustifiable expense and delay in accordance with the Federal Rules of Criminal Procedure. In this light, the determination was evidently made by the Government that since all the facts were present upon which a resolution of the matter depended, it would aid both parties to have the matter heard and disposed of

at a hearing of the Motion to Dismiss.

Justice would dictate that in a case where the Government's evidence has been thoroughly reviewed by the District Court and what is the functional equivalent of a judgment of acquittal has been entered, Petitioner should not be subject to any further actions against him, even in the form of an appeal by the Government.

ARGUMENT

This case raises very important issues on the meaning of the double jeopardy clause of the United States Constitution and the statutory construction of the recently amended Criminal Appeals Act, 18 U.S.C. Section 3731. The construction of this statutory section, as applied by the Third Circuit Court of Appeals in this Case, has put the Defendant, Petitioner, twice in jeopardy in violation of the clear import of the statute itself and the United States Constitution.

It appears that the amendment to the Criminal Appeals Act under consideration was prompted by problems of appealability encountered by the Department of Justice. (Amendments to the Criminal Appeals Act, S. Rep. No. 91-1296, 91st Cong., 2d Sess.) Petitioner also recognizes that the action taken by the Congress was also prompted by the decision of the Supreme Court in *United States v. Sisson*, 399 U.S. 267, 90 S. Ct. 2117, 26 L. Ed. 2d 608 (1970). Justice Harlan, writing for the Court, had indicated in his Opinion that the statute as it existed at that time left much to be desired as far as its applicability to the present procedural categories of the Federal Rules of Criminal Procedure, as its roots were grounded in pleading distinctions that existed at common law. It is clear, however, that even given the reasons for the amendment of the statute, this does not obviate the necessity for looking at each case as it arises on its own factual background. The Supreme Court has admonished against the use of technicalities in interpreting the double jeopardy provision of the United States Constitution. See *Illinois v. Somerville*, 410 U.S. 458, 35 L. Ed. 2d 425, 93 S. Ct. 1066 (1973).

The principle enumerated in the Fifth Amendment of the Constitution under consideration is truly an ancient concept in the civilized world. *Bartkus v. Illinois*, 359 U.S. 121, 151 (1959). (Black J. dissenting.) In fact, it has been traced back to the time of Demosthenes, 355 B.C., when he stated that,

> "The laws forbid the same man to be tried twice on the same issue, be it a civil action, a scrutiny, a contested claim, or anything else of the sort." 1 Demosthenes 589 (Vance trans. 1962). Cited in *U.S. v. Jenkins*, 490 F. 2d 68, 70 (2nd Cir., 1973).

This ancient concept is not always easy to apply but its basic reasoning is centered around the proposition that,

> "The State, with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal, compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty." *Green v. U.S.*, 355 U.S. 184, 187-188, 78 S. Ct. 221, 2, L. Ed. 2d 199 (1957).

With these concepts in mind, other courts have stated that even though the general principle as to whether or not jeopardy has attached revolved around the question as to whether or not jury trial has either been waived and the Court has begun to hear evidence or the jury has been impaneled and sworn, this is only a strong presumption, which it is argued, should be rebuttable. See *U.S. v. Velazquez*, 490 F. 2d 29 (2nd Cir., 1973). See also *U.S. v. Pecora*, 484 F. 2d 1289, 1293, (3rd Cir., 1973) where in distinguishing *U.S. v. Hill*, 473 F. 2d 759, (9th Cir., 1972) the Court stated that the District Court in *Hill, supra*, determined the character of evidence entered into the record and concluded that, therefore, jeopardy had attached. The critical question then to be determined is really a policy determination in any

given situation, that is,

> "Whether the Government's action . . . reached the point where the Government's power to retrace its steps is checked by countervailing interests of the individual protected by the double jeopardy clause of the Fifth Amendment." *Velazquez, supra,* at 1096.

In the case at hand, it is important to review the facts at this point which would specifically relate to the question presented. First, it is important to note that by virtue of the presentation of the Defendant's affidavit in support of his Motion to Dismiss, then later his entire Selective Service File, and from the Stipulation of Counsel, none of the facts upon which the resolution of the Motion depended was in dispute. Second, Briefs were submitted and a confrontation between the parties in the form of oral argument took place. With this situation, the District Judge determined that,

> "Although Defendant has not waived his right to trial by jury a defense based upon an alleged procedural defect in the Selective Service classification process is to be determined by the Court." Fed. R. Crim. P. 12(b)(4)." *United States of America v. David Emery Serfass,* No. 15229 Cr., July 16, 1973. (A. A)

The first argument of Petitioner centers around the proposition set forth in *United States v. Sisson,* 399 U.S. 267, 289, 290, 26 L. Ed. 2d 608, 90 S. Ct. 2117 (1970), that

> "Quite apart from the statute, [in this case the Supreme Court was referring to the old 18 U.S.C. 3731] it is, of course, well settled that an acquittal can 'not be reviewed on error or otherwise, without putting [the Defendant] twice in jeopardy, and thereby violating the Constitution. . . . [I]n this country a verdict of acquittal, although not followed by any judgment, is a bar to a subsequent prosecution for the same offence,' ". Citing *United States v. Ball,* 163 U.S. 662, 671. 41 L. Ed. 300, 16 S. Ct. 1192 (1896).

The question then becomes whether the decision of Judge Sheridan, although labeled a Dismissal of the Indictment was

the functional equivalent of an acquittal on the merits. First of all, it would be necessary to find that the trial court had, in fact, reached beyond the face of the indictment, gathering "evidentiary facts outside of the indictment, which facts would constitute a defense on the merits at trial.". *United States v. Brewster,* 408 U.S. 501, 506, 33 L. Ed. 2d 507, 514, 92 S. Ct. 2531 (1972). It is unequivocally clear that the Judge reached beyond the face of the indictment in that he considered the Defendant's affidavit in support of his Motion to Dismiss, the entire Selective Service File, which was ordered by the Judge to be sent to the Court (A. J), and the Admission of Counsel which in *Velazquez, supra,* at 1098, is cited as being equivalent to a showing of evidentiary facts outside of the indictment, such Admission relating to the fact that the information which had been submitted by Petitioner to his Local Selective Service board had, in fact, established a prima facie claim for conscientious objector status based upon a late crystallization. The question then remaining would be whether or not these facts, clearly beyond the face of the indictment, would in fact constitute a defense on the merits at trial. That the position of Petitioner as presented to the Judge at the District Court level would have constituted a defense on the merits at trial is beyond question. The District Judge did, in fact, find under the law existent at the time, that such facts did constitute a valid defense and, therefore, granted the Motion to Dismiss.

It is also important to note at this point that the label given to the decision or order of the District Court is not controlling, *United States v. Sisson, supra,* at 288. Although the District Court labeled its decision on the Petitioner's Motion to Dismiss as an Order Dismissing the Indictment, it is clear that, in effect, the Dismissal operated as an acquittal on the merits. The First Circuit has expressed this viewpoint in the case of *United States v. Findley,* 439 F. 2d 970 (1st Cir., 1971). In a substantially similar fact situation, that court held that,

> "If a dismissal is a result of the showing of eviden-

> tiary facts, dehors the indictment, which, if established at a trial would constitute a defense on the merits, the Court's ruling, however described, . . . is, in effect, an acquittal . . ." *Findley, supra,* at 972.

This reasoning was also set forth in *United States v. Ponto*, 454 F. 2d 647 (7th Cir., 1971), and in the companion case of *United States v. Grochowski*, 454 F. 2d 655 (7th Cir., 1971).

Assuming the order was, in effect, an acquittal, the next matter to be considered would obviously be whether one could say that as a result of that fact, that jeopardy had attached. It is recognized that the general rule with reference to when jeopardy attaches is that

> "[i]n a jury case, jeopardy attaches when a jury has been impaneled and sworn; in a non-jury case, jeopardy attaches after the court has begun to hear evidence." *United States v. Pecora*, 484 F. 2d 1289, 1293 (3rd Cir., 1973).

As was stated in *Velazquez, supra,* at 1095, however,

> "[i]t is not wholly dispositive of the claim raised . . . to state that since the jury was neither waived nor impaneled, jeopardary could not have attached, although this gives rise to a strong presumption."

This is clearly the implication in *Sisson*, as well, where the statement is made that an acquittal could not be reviewed without putting the defendant twice in jeopardy. *Sisson, supra,* at 289, 290. It is to be noted as well that the Supreme Court has warned against applying mechanical tests with reference to the question as to whether or not jeopardy has attached. *Somerville, supra.* The fact that the swearing in of a jury or waiver of the right of jury trial is only a presumption as to when jeopardy attaches is also made clear by the holdings of many of the Circuit Courts of Appeal which have dealt with this issue. The United States Court of Appeals, Fourth Circuit, has recognized this precept in the case of *United States v. Southern Railway Company*, 485 F. 2d 309 (4th Cir., 1973). In that case, the Southern Railway Company was charged with having willfully

failed to observe strictly its published tariffs in violation of the Elkins Act, 49 U.S.C. §41(1). The basic charge of the Government centered around the alleged fact that Southern Railway had not required General Tire to attach manifests or execute certifications with respect to eight shipments of sponge rubber carpet purchased by General Tire and Rubber Company. Southern filed a Motion to Dismiss the Indictment and the District Court heard oral argument on that Motion at which time Southern filed an amended Motion to Dismiss over the objection of the Government. The amended Motion made the claim that the required manifests were, in fact, contained in the shipping orders attached to the shipments. The District Court then received, without objection, the shipping orders which had accompanied the shipments and copies of the applicable tariff. The court also heard oral argument at this time and each party was allowed to present its claims to the Court. The Court held, after reviewing the evidence and at the conclusion of argument, that the shipping orders constituted a manifest and, therefore, granted the defendant's Motion to Dismiss. The Government appealed the holding of the District Court, taking exception to the finding that the shipping orders complied with the manifest requirement of the tariff. Southern made the contention that the decision of the District Court was in actuality, an acquittal on the merits, and, therefore, to allow it to be tried after dismissal would constitute double jeopardy. The Court went on to state that it felt that the proper determination to be made by the Court of Appeals should be,

> "Whether the District Court's determination of the prosecution was actually an acquittal on the merits of the case." *Southern Railway, supra,* at 312.

The court went on to conclude that if the District Court's determination was found to be an acquittal, then no appeal could be taken by the Government because of the fact that jeopardy would have attached. Citing *Sisson, supra,* at 289-290. The Court reasoned that the District Court had held a full

hearing and allowed Southern to file exhibits to support its Motion to Dismiss. It then noted that the issue which was presented to the District Court was, for all practical purposes, the only issue to be tried. Upon this analysis, the court concluded that the dismissal was, in reality, a Judgment of Acquittal on the merits and, therefore, jeopardy had attached and the Government was precluded from appealing.

There is no question but that the facts in Petitioner's case are substantially similar to those in the case of Southern Railway. In both of the cases, the decision of the District Court was made on the basis of not only the Motion to Dismiss and the affidavit attached thereto, but also on the facts which were presented in addition to them. In the case at bar, the District Judge undoubtedly placed great emphasis on the Stipulation of Counsel (that Serfass had established a prima facie case for conscientious objector classification) made in court during the hearing on the Motion to Dismiss. This Stipulation was of great import as is evidenced by Footnote No. 1 in *Findley, supra,* at 972, where the Court there commented upon the question of the relevancy of establishing a prima facie case aspect regarding conscientious objector classification. The District Judge had determined that the question was not relevant but the Court of Appeals, citing *Mulloy v. United States,* 398 U.S. 410, 416, 90 S. ct. 1766, 26 L. Ed. 2d 362 (1970) states:

> "We must, accordingly, take it that in the Court's view it was immaterial whether the form was defective or insufficient on its face. Whatever the ultimate resolution of the present dispute as to the duty of the Board to specify its reasoning in refusing to reopen, if the defendant did not even have openers [Here the court is clearly referring to the question as to whether or not the defendant had made out a prima facie case.] we clearly wonder how or why he should get into the play."

After citing *Mulloy,* the Court also then referred to 32 C.F.R. §1625.2 which is the Federal Regulation dealing with the obligation of the Local Board to reopen if the registrant makes

out a prima facie, and then states that, "there is no obligation on the board if he does not." Again, the fact that this Stipulation had been entered into in the case at hand cannot be emphasized enough. It clearly is one of the things which Petitioner would have been required to prove in order for the draft board to have been under any kind of obligation to hear his claim at all. This stipulation clearly obviated any necessity for a later factual determination and was clearly needed in order for the District Judge to make a determination on the Motion to Dismiss at this point in the proceedings. See *United States v. Fargas,* 267 Fed. Supp. 452 (S.D.N.Y. 1967). This Stipulation was substantially similar to the one in which the District Court in *Southern Railway, supra,* received *"without objection"* (emphasis added) evidence that shipping orders had accompanied the shipments to General Tire, as well as copies of the tariff. In addition, in both *Southern Railway* and the case at hand, each side to the controversy was given the opportunity to argue its case.

The clear import of the case indicates that where there is an acquittal, jeopardy attaches and the United States is precluded from appealing. Other case law points in the same direction. In *United States v. Rothfelder,* 474 F. 2d 606, (6th Cir., 1973) the rationale is the same for finding the Government could not appeal, in a substantially similar case involving the Selective Service Laws, where the Court held that no appeal was available to the Government from a Judgment of Acquittal. The District Court in tnis case had granted the Defendant's Pre-Trial Motion to Dismiss the Indictment and based its finding on facts contained in the defendant's Selective Service File. For this reason, the Court found that the judgment, although characterized as the granting of a Motion to Dismiss, in effect was an acquittal.

The Third Circuit Court of Appeals in deciding the case at bar with reference to the jurisdictional question relied on its decision in *Pecora, supra,* at 1289. Pecora was indicted for allegedly having violated §302(b) of the Labor Management

Relations Act, 1947, which made it an offense for an employee representative to receive from an employer, "any payment, loan, or delivery or any money or other thing of value." 29 U.S.C. §186. The parties entered into a Stipulation of Facts upon which the indictment was based. This Stipulation was appended to *Pecora's* Motion to Dismiss the Indictment. The District Court decided that on the basis of this Stipulation of Facts upon which the indictment was based that there was no violation of the statute and, therefore, dismissed the indictment. The Government appealed the decision and the Court was faced initially with a determination as to whether or not §3731 prohibited appeal by the Government. In deciding that the Court did have jurisdiction to entertain the appeal, the court was faced with the dicta of the Supreme Court in *Brewster, supra,* at 506, noting that an appeal would not lie from a decision resting upon extraneous facts based upon a stipulated fact, or showing of other evidentiary facts outside the indictment, "which facts would constitute a defense on the merits at trial. . .". It was noted that the decision in *Brewster* was based upon an appeal under the old §3731 and also noted was the Supreme Court's citing of *Findley, supra.* With reference to the Findley decision, it was noted that the court specifically found that the defendant had not been formally placed in jeopardy and, therefore, concluded that the holding in *Brewster, supra,* was based not on jeopardy provisions but rather on the basis of the old §3731. Petitioner agrees that formal or technical jeopardy had not attached but it is submitted that constructively jeopardy had attached.

The Third Circuit in *Pecora, supra,* at 1293, also attempts to distinguish the decision in *United States v. Hill* 473 F. 2d 759 (9th Cir., 1972). It distinguished *Hill* on two grounds. First, it is noted that the Court in *Hill, supra,* did not make any determination as to whether or not the defendant had waived his right to jury trial. (See A. P, however where there is no notation in the docket entries in the District Court to indicate that any

party had waived jury trial.) The Court in *Pecora* itself recognized in its second distinction that the general principle with reference to the attachment of jeopardy being measured on whether or not jury trial has been waived or not is not fully determinative of the issue. The second distinguishing feature between *Pecora* and *Hill,* the Court noted was that evidence was actually entered into the record in the *Hill* case. "*The District Court determined the character of that evidence so it may be said that jeopardy had attached.*" (emphasis added), *Pecora, supra,* at 1293.

It is important at this point to look at the decision in *Hill. Hill* was a case in which the Government sought Writs of Mandamus directing the District Judge to vacate an Order dismissing the indictments in the case of *United States v. Linetsky,* et al., No. 7145, and *United States of America v. Carlo,* et al., No. 7142, Central District of California. The defendants had been charged with violations of 18 U.S.C. §1461, in that they knowingly deposited obscene advertisements in the United States mail. The parties entered into a Stipulation to the effect that the materials that appeared in the same were, in fact, copies of the materials upon which the indictment was based. The Defendants made a Motion to Dismiss the indictment pursuant to Rule 12, F. R. Crim. P. Hearings were held on the Motion and the defendants were allowed to introduce into evidence the Stipulated materials and certain other materials. The District Judge then made the determination that the materials which formed the basis of the indictments were, as a matter of law, not obscene and, therefore, dismissed the indictments. The Government appealed under 18 U.S.C. §3731. Here the Court reasoned that jeopardy had attached and, therefore, refused to hear the issue on the merits. The Court reasoned that since the District Court had considered evidence going to the general issue in the case, the finding, although characterized as a granting of a Motion to Dismiss, was, in effect, a holding that the defendants were not

guilty. *Hill, supra,* at 761. In arriving at its decision, the Court cited the case of *United States v. Oppenheimer,* 242 U.S. 85, 37 S. Ct. 68, 61 L. Ed. 161 (1916), in order to buttress its holding that the designation of the court's ruling as granting a Motion to Dismiss is not conclusive of whether or not it was, in effect, a trial. The case is also cited for the proposition that an adjudication on the merits is final. *Hill, supra,* at 761, 762. Special note should be made of the fact that the Court of Appeals believed that the District Judge "did not think that he was holding a trial; he believed that jeopardy had not attached.", *Hill, supra,* at 762. The Court goes on, however, to find that jeopardy had, in fact, attached as the Judge had decided the general issue and that in substance, though not in form, an acquittal had been granted.

The particularly relevant aspect of your Petitioner's case in light of the decision in *Hill* is that to the extent that the Third Circuit Court of Appeals attempts to distinguish the holding in *Hill* from its holding in Petitioner's case, it is clearly erroneous. As has been set forth above, it is very clear that the prior case law substantiates the fact that although Petitioner was not technically in jeopardy, the policy considerations behind the double jeopardy provisions in the Constitution would be clearly violated by allowing the Government to appeal in this situation. It is clear that as in *Hill, supra,* evidence here was actually entered into the record and it is clear also from the holding of the District Court that the entire Selective Service File, all of the Government's case, was considered.

It is clear, also, that the case of *United States v. McCreery,* 473 F. 2d 1381 (1973) which embraced the constitutional, double jeopardy theory espoused in *United States v. Ponto,* 454 F. 2d 657 (1971), would be applicable to the case at hand and would preclude an appeal by the Government. The reasoning in *Ponto, supra,* at 663 was that since the order dismissing the indictment in that case was based upon a determination on the merits, it was, in essence, an acquittal to which jeopardy had

attached. To the extent that the opinion of the concurring judges differs from the constitutional analysis as set forth in *Ponto* it is erroneous. It is submitted that to argue that although the decision in Petitioner's case by anyone's standards, would clearly bar a second prosecution, to hold that an appeal would be allowed, would be putting form over substance, a dangerous concept when dealing with basic constitutional rights. *Hill, supra,* at 763.

It is instructive at this point to note that there have been two recent cases which have had to deal with the problem of appealability in light of the other recent decisions cited above. In the case of *United States v. Walker,* 489 F. 2d 1353, (7th Cir., 1973), the Court distinguished from Walker's case the rulings in *Ponto, Growchowski, Gustavson,* and *McCreery, supra.* The distinguishing factor noted was that,

> "... each of the dismissals sustained the merits of an affirmative defense. In the case before us, however, the Government's Stipulation is a particularization of the general allegation in the indictment. By revealing the facts, it is prepared to prove, the Government has, in effect, narrowed the charge in the indictment." *Walker, supra,* at 1355, 1356.

Also in the case of *United States v. Goldstein,* 479 F. 2d 1061, (2nd Cir., 1973), the appellees attempted to rely upon the decision in *Hill, supra.* The Court, in distinguishing *Hill* stated as follows:

> "Hill involved indictments charging the sending of obscene advertisements through the mail. Defendant's Motion to Dismiss the Indictments was granted on the ground that the advertisements were not obscene as a matter of law. In finding reprosecution prohibited by the double jeopardy guarantee, the Court noted that the Judge had received evidence limited to a necessary element of the offense; the dismissal thus decided the general issue of guilt and was the equivalent of a directed acquittal." See *United States v. Sisson, supra,* 399 U.S. at 290 n. 19 90 S. Ct. 2117; *United States v.*

Ponto, 454 F. 2d 657, 663-664 (7th Cir., 1971) (en banc).

"Judge Weinstein's dismissal, by contrast, in no sense turned on the general issue of guilt or required the taking of evidence remotely related to any element of the crime."

It is very clear that both of these cases acknowledge the general proposition that although technical jeopardy may not have attached, what we might refer to as "constructive" jeopardy, may attach in circumstances like the cases of *Hill*, *McCreery* and, it is submitted, *Serfass*.

With reference to the holdings of the two circuits which might be considered to be adverse to your Petitioner's position, it is argued that they are clearly distinguishable from your Petitioner's case. The case of *United States v. Martin Linen Supply Company*, 485 F. 2d 1143, (5th Cir., 1973) is distinguishable on the ground that there was a finding that the District Judge had not commenced a hearing of the evidence. Without a doubt, at least under the rationale of *Hill*, *supra*, at 761, it cannot be argued that the District Judge in this case had not heard the Government's evidence. In fact, it is argued that by virtue of the Judge's having the whole Selective Service File to consider and by virtue of the fact that the Government had agreed that Petitioner had made out a prima facie case, all of the evidence that the Government had to present against Petitioner was, in fact, before the Judge and was considered in the decision. The case of *United States v. Brown*, 481 F. 2d 1035, (8th Cir., 1973) is also distinguishable from the case confronting your Court at present. It is clearly indicated by the Court of Appeals, Eighth Circuit, that in the *Brown* case the full evidence was not before the court. The Court found in *Brown* that factual issues had not been decided and that the only thing decided by the lower court was a decision not to accept the defendant's pleas of guilty. In Petitioner's case, it is clear, as set forth above, that factual questions which were intertwined with

the general issue were clearly set forth and the Judge made his determination on the basis of those facts.

The facts of the *Brown* case lead to another point which must be raised with reference to the question presented. In *Brown*, *supra*, special emphasis is placed upon the fact that the Government was unwilling to consent to the submission to the case to the Court on stipulation, *Brown*, *supra*, at 1038. It certainly would have been possible for the Government to do so and it is argued that if this had been done, the United States Court of Appeals, Eighth Circuit, might well have come up with a different decision. At any rate, it is clear that the District Judge in Petitioner's case was aware of the impact of the stipulation entered into by the Government and his consideration of Petitioner's whole Selective Service File. The Judge notes that the Motion to Dismiss the Indictment based upon the contention that Petitioner had been denied due process of law as a result of the Local Board's having inadequately set forth its reasons for denying Petitioner's post-induction order request to reopen his classification was a defense which would be properly raised by motion before trial. *United States v. Serfass*, No. 15229 Cr., (A. A) The statement is concluded by the recitation that this would be especially so, *"since none of the facts upon which its resolution depends is in dispute"*. *Serfass*, *supra*, at (A. A [emphasis added]). In citing authorities for his position, the Judge referred to portions of a number of cases which dealt with the authority of the Judge to rule on the dismissal motion. See *United States v. Sisson*, 1970, 399 U.S. 267, 301-02 & n. 55, 56; *United States v. Knox*, 1969, 396 U.S. 77, 83 & n. 7; *United States v. Covington*, 1969, 395 U.S. 57, 60-61; *United States v. Fargas*, S.D.N.Y. 1967, 267 F. Supp. 462, 455-57. The case of *United States v. Fargas*, *supra*, is especially instructive. In that case the defendant, indicted under 50 App. U.S.C. §462 for failure to submit to induction into the Armed Forces, moved to dismiss the indictment. In support of this dismissal

motion, the defendant submitted an affidavit citing relevant facts from his Selective Service File. The defendant made the argument that the facts as recited in this affidavit constituted a complete defense to the charge made. The District Court, noting that it could in its discretion order that a motion be deferred for determination at trial of the general issue, Rule 12(b)(4), F. R. Cr. P., denied the request to dismiss the indictment at that stage in the proceedings. The Court's rationale was based upon the belief that the defense as raised by Fargas could not be determined from the papers before the Court at that time. Fargas, as was Petitioner, was what is referred to as a late crystallizer, and was basing his dismissal motion on the same grounds as your Petitioner. The Court, in noting that it was faced with too few facts in order to determine the question, and also noting that those factual questions, were, "closely related to and intermingled with the issue which must be decided at a trial on the merits", *Fargas, supra,* at 457, decided that the motion was not ripe for determination at that time and, therefore, declined to dismiss the indictment. In light of the fact that the District Judge in the case at bar has cited *Fargas, supra,* it is the inescapable conclusion that the Judge had determined that a postponement of the determination of the motion to the time of trial was unnecessary, as the Government had stipulated the one relevant factual question which might have been necessary to be made at trial and, in addition, had considered Petitioner's entire Selective Service File, which was all the evidence that the Government had against Petitioner. (It should be noted that in refusal to submit to induction cases everything is entered in a registrant's file so that the Government need only prove the file and thus *proves* a prima facie case; thus it can safely be stated that the Government's entire case was before the District Judge.) In light of this, the inescapable conclusion again is that Petitioner's case was decided on the merits and as such, although labeled as an order dismissing the indictment, functionally was an acquittal to which jeopardy attaches.

Except for the facts which shouted from Petitioner's Selective Service File, which compelled the Government in good faith to stipulate that Petitioner had made out a prima facie case for conscientious objector status, there was no necessity for the Government to agree to this. It was clearly a factual matter which the Court would have had to determine at trial in order for the holdings in *United States v. Ziskowski,* 465 F. 2d 480, (3rd Cir., 1972) and other similar cases even to have applied to the question presented before the District Court. If the facts were not there the Government was certainly free to oppose the Motion to Dismiss on the basis that it contested the fact that Petitioner had made out a prima facie case as a conscientious objector. Also, to the extent that the District Judge's analysis of his authority to entertain the Motion at that time was improper a suggestion Petitioner strongly doubts, Petitioner should certainly not have to bear the burden of being subjected to another "go-around" with the Government as a result of that. See *Hill, supra,* at 762.

A final argument centers around the oft-mentioned caveat regarding the fact that the question as to whether or not jeopardy attaches is not to be decided by a mechanical test. *Illinois v. Somerville,* 410 U.S. 458, (1973); *United States v. Jorn,* 400 U.S. 470 (1971); *United States v. Sisson,* 399 U.S. 267, (1970). It is unmistakably clear that had either the court ordered that it could not determine the Motion to Dismiss at that time and directed that the parties proceed to trial, see *Fargas, supra,* or had Petitioner proceeded to have a jury impaneled and sworn, technical jeopardy would have attached. See *Findley, supra,* at 974. It is important to note that the announced purpose of the Federal Rules of Criminal Procedure, Rule 2, is as follows:

> "These rules are intended to provide for the *just* determination of every criminal proceeding (emphasis added). They shall be construed to secure simplicity in procedure, fairness in administration and the *elimina-*

tion of unjustifiable expense and delay." (emphasis added.)

It is suggested that the Criminal Appeals Act and the Federal Rules of Criminal Procedure ought to work together, at least to the extent that if what is in effect an acquittal is entered, as in this case, on a Motion to Dismiss an Indictment before a jury has been impaneled and that dismissal is based upon stipulated facts and all the evidence which the Government had to present, jeopardy should be held to have attached and an Appeal should be barred.

There is some concern as was expressed in the majority opinion in *Velazquez, supra,* at 1100, that the power should not be given to a trial judge at this stage in the proceedings to forever bar further prosecution of a criminal defendant. But the dissent in *Velazquez, supra,* at 1113, amply points out that the Judge, in fact, has that power now either to dismiss the indictment on undisputed facts after the trial has commenced or by the directing of an acquittal at the close of the Government's case. This is, of course, amply pointed out by the decision of the Supreme Court in *Fong Foo v. United States,* 369 U.S. 141, 7 L. Ed. 2d 629, 82 S. Ct. 671 (1962). In that case the Judge directed the jury to return verdicts of acquittal on the basis that Government witnesses were, up to that point, incredible, and on the alleged improper conduct on the part of the Assistant United States Attorney prosecuting the case. The Supreme Court held that the judgment of acquittal, even though based upon "an egregiously erroneous foundation," was final and therefore could not be reviewed without putting the petitioners twice in jeopardy in violation of the United States Constitution.

Surely justice would dictate that in a case where the Government's evidence has been thoroughly reviewed by the District Court and, what is in effect, a judgment of acquittal has been entered for Petitioner, that justice would dictate that he should not be subject to any further actions against him, even in the form of an appeal, by the Government.

CONCLUSION

Petitioner (the Defendant) was twice put in jeopardy and therefore the judgment of the Court of Appeals regarding the finding that it had jurisdiction should be reversed and the Order of the District Court Dismissing the Indictment should therefore be reinstated.

Respectfully submitted,

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JUNE, 1974.



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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1424

DAVID EMERY SERFASS, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 20-34) is reported at 492 F.2d 388. The opinion of the district court (Pet. App. 16-18) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on February 20, 1974. The petition for a writ of

certiorari was filed on March 22, 1974, and was granted on April 22, 1974. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Double Jeopardy Clause bars an appeal by the United States from an order, entered prior to the empanelling of a jury, dismissing an indictment on the basis of a legal ruling by the district court after examination of records and affidavits setting forth the evidence to be adduced at trial.

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The Fifth Amendment to the United States Constitution provides, in pertinent part:

> * * * nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb * * *.

18 U.S.C. 3731 provides, in pertinent part:

> In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment or information as to any one or more counts, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution.
>
> * * * *
>
> The provisions of this section shall be liberally construed to effectuate its purposes.

STATEMENT

On October 11, 1972, a grand jury empaneled in the United States District Court for the Middle District of Pennsylvania returned an indictment charging petitioner, David Emery Serfass, with wilfully failing to report for induction into the Armed Forces, in violation of 50 U.S.C. App. 462(a). Prior to trial, petitioner moved to dismiss the indictment on the ground that the local board had failed to state adequate reasons for its refusal to reopen petitioner's classification to consider a post-induction-order claim for treatment as a conscientious objector (App. 2-5). The district court granted the motion (Pet. App. 15-18), and the United States appealed to the court of appeals under the Criminal Appeals Act, 18 U.S.C. 3731, as amended by the Omnibus Crime Control and Safe Streets Act of 1970, 84 Stat. 1890. The court of appeals rejected petitioner's claim that an appeal was barred by the Double Jeopardy Clause. On the merits, the court of appeals reversed the order dismissing the indictment and remanded the case for trial or other further proceedings in accordance with its opinion (Pet. App. 25-34; App. 19).

1. The material facts are not in dispute. On December 18, 1970, petitioner was ordered to report for induction on January 18, 1971 (App. 7). After receiving the order, petitioner filed an application for classification as a conscientious objector. On Jan-

uary 14, 1971, after an interview with the local board, petitioner was advised that the local board had considered his entire file at their meeting the previous day and that they had agreed unanimously "that there was no change over which you had no control" and that it had therefore "decided not to reopen your file" (App. 9). On January 18, 1971, petitioner failed to report for induction as ordered. The present indictment followed.

2. Prior to trial, petitioner filed two motions. Petitioner moved to dismiss the indictment on the ground that the local board did not state adequate reasons for its failure to reopen his classification (App. 2-3). At the same time, petitioner moved "to postpone the trial of the within matter which is now scheduled for January 9, 1973, for the reason that a Motion to Dismiss has been simultaneously filed and the expeditious administration of justice will be served best by considering the Motion prior to trial" (App. 10).

On January 5, 1973, the district court granted the motion to postpone the trial (App. 11), and ordered that oral argument on the motion to dismiss be heard on February 6, 1973 (App. 12). After hearing oral argument, the district court entered an order, which was complied with, directing the parties to submit a copy of petitioner's Selective Service File (App. 13). On July 16, 1973, the district court ordered that the indictment be dismissed (App. 15). After setting out the material facts, which were "derived from defendant's affidavit in support of his motion, from his

Selective Service file, and from the admissions of counsel" at oral argument to the effect that "the information which Serfass submitted to the Board establishes a prima facie claim for conscientious objector status based upon late crystallization" (Pet. App. 17-18), the district court held that petitioner was "entitled to full consideration of his claim prior to assignment to combatant training and service. *Ehlert* v. *United States*, 1971, 402 U.S. 99, 103-04 and n. 7, 107" (Pet. App. 18). Since "the statement of reasons given for refusing to reopen [was found to be] sufficiently ambiguous to be reasonably construed as a rejection on the merits, thereby prejudicing [petitioner's] right to in-service review," the district court granted the motion to dismiss the indictment (Pet. App. 18).[1]

3. The United States appealed pursuant to the Criminal Appeals Act, 18 U.S.C. 3731, as amended by the Omnibus Crime Control and Safe Streets Act of 1970, 84 Stat. 1890. The court of appeals unanimously rejected petitioner's claim that it was without jurisdiction to hear the appeal and reversed the order of the district court on the merits. Speaking to the issue of appealability, the only issue raised by the

---

[1] The concern of the district court—that petitioner's right to in-service review would be prejudiced by the local board's rejection of his claim—was apparently based upon Section 3.b(2) of Army Regulation 635-20, which states that in-service claims for conscientious objector treatment will not be considered favorably when "based solely on conscientious objection claimed and denied by the Selective Service System prior to induction." See *Musser* v. *United States*, 414 U.S. 31.

petition for a writ of certiorari, the court of appeals found that cases construing the old Criminal Appeals Act to preclude an appeal in similar circumstances were inapposite. It held that "[t]he 1971 amendment to § 3731 * * * was clearly intended to enlarge the Government's right to appeal to include all cases in which such an appeal would be constitutionally permissible" (Pet. App. 23). Accordingly, it concluded that "[c]ases decided under the prior version of § 3731 are of little aid in determining appealability under the present version" (*ibid.*).

Moreover, relying on its earlier opinion in *United States* v. *Pecora*, 484 F.2d 1289 (C.A. 3), the court of appeals also held that an appeal in this case was not barred by the Double Jeopardy Clause. In *Pecora*, the court of appeals, discussing the appealability of a pretrial dismissal, held that "absent the defendant's waiver of his right to a jury trial pursuant to Rule 23(a) of the Federal Rules of Criminal Procedure, jeopardy does not attach until the jury has been impaneled and sworn" (Pet. App. 24). Although *Pecora* involved a pretrial dismissal based upon a stipulated statement of facts "raising a legal issue," the court of appeals found that there was no meaningful distinction between the situation here and that in *Pecora* (Pet. App. 24-25):

> Although the instant dismissal was based upon the trial court's finding that the defendant had established a defense as a matter of law, rather than upon the finding as in *Pecora*, that there were insufficient facts as a matter of law to support a conviction, we see no significant constitutional difference between the two situations. Both involved a determination as to the legal sufficiency of certain facts, and in either case denial of the motion to dismiss entitled the defendant to the jury trial which he has not waived. We therefore hold that jeopardy did not attach and the dismissal of the indictment in the instant case was an appealable order.

Turning to the merits, the court of appeals, relying upon *Musser* v. *United States*, 414 U.S. 31, held that, since the local board was without power to rule on the merits of a post-induction-order conscientious objector claim, petitioner's right to in-service review of his late crystallization claim was not prejudiced. Accordingly, the order dismissing the indictment was reversed and the case remanded to the district court "for trial or other proceedings consistent with this opinion" (Pet. App. 31-34).

4. On March 22, 1974, a petition for a writ of certiorari was filed, limited solely to the issue whether the order of dismissal was appealable. Petitioner contended that the construction of Section 3731, "as applied by the Third Circuit Court of Appeals in this case, has put the defendant, your Petitioner, in jeopardy in violation of the clear import of the statute itself and the United States Constitution" (Pet. 5). Since there is a conflict among the courts of appeals over the issue whether the Double Jeopardy Clause permits an appeal from a pretrial order dismissing an indictment on the merits, the United States did

not oppose the petition for a writ of certiorari (Memorandum for the United States, pp. 12-13).

SUMMARY OF ARGUMENT

The Criminal Appeals Act, 18 U.S.C. 3731, provides for an appeal by the United States to the court of appeals "from a decision, judgment, or order of a district court dismissing an indictment * * * except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution." The statute, as it presently reads, was enacted in 1971 and was intended to "assure that the United States may appeal [to the court of appeals] from the dismissal of a criminal prosecution by a district court in all cases where the Constitution permits" (S. Rep. No. 91-1296, 91st Cong., 2d Sess., pp. 2-3). Moreover, Congress explicitly indicated its intent that the United States be permitted to appeal from pretrial dismissals of indictments in selective service cases based on a "finding that there have been errors by draft boards" (*id.* at 14).

It is therefore clear that the appeal by the United States to the court of appeals in this case was proper unless the Double Jeopardy Clause bars an appeal from a pretrial order dismissing an indictment on the merits. Although petitioner had moved for and obtained a continuance of the trial pending the determination of his motion to dismiss the indictment, and although it is undisputed that a jury trial had not been waived and that petitioner

was not in jeopardy of conviction at the time the motion to dismiss was granted, he argues "that because of the fact that the dismissal of the indictment was the functional equivalent of an acquittal on the merits, that constructively, jeopardy had attached" (Br. 5). This claim rests upon misconception of the history and language of the Double Jeopardy Clause as well as the significant considerations of policy that it reflects.

"The constitutional prohibition against 'double jeopardy,'" as this Court has held, "was designed to protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense"; it therefore prohibits the state from making "repeated attempts to convict an individual for an alleged offense, [and] thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty." *Green* v. *United States*, 355 U.S. 184, 187-188.

These considerations have led to the adoption of the rule that a defendant has been placed in jeopardy only upon the commencement of a trial before the trier of fact. It is obvious, merely in stating the rule and the considerations it reflects, that petitioner, who was never tried and who was never in jeopardy of having a judgment rendered against him by the trier of fact, cannot invoke the protection of the Double Jeopardy Clause. Petitioner was not subject to

the "heavy personal strain which a criminal trial represents for the individual" nor was he subject to the "embarrassment, expense and ordeal" of a trial.

Under these circumstances, every opinion of this Court construing the Double Jeopardy Clause with reference to government appeals has held that an appeal will lie from a pretrial dismissal of an indictment, regardless of whether the dismissal is based on the sufficiency of the evidence or on some other defense to the indictment (*e.g.*, statute of limitations) that has the effect of ending the case and exculpating the defendant. Like the English cases construing the common law rule, from which the Double Jeopardy Clause was derived, these decisions of this Court implicitly reject the argument that there is any such thing as the "equivalent of an acquittal" when a defendant has never been tried and placed in jeopardy. Simply put, then, the decisions of this Court uniformly support the proposition that petitioner could not stave off the government's appeal by relying on *double* jeopardy considerations when he has yet to be placed in jeopardy at all.

Petitioner's brief largely ignores the overwhelming authority sustaining the right of the United States to appeal from the pretrial order dismissing the indictment here. The arguments he does advance are derived principally from the opinions of some courts of appeals which have held or suggested that the Double Jeopardy Clause does not permit an appeal from a pretrial order dismissing an indictment on the merits. These cases have reached this conclusion

on various grounds, including (1) that jeopardy attaches to an acquittal, (2) that the doctrine of *res judicata*, which is applicable to criminal as well as civil proceedings, bars an appeal by a party from an adverse judgment, (3) that the Double Jeopardy Clause was intended to limit the number of times a defendant may be required to submit proof of his innocence and that the conduct of a pretrial hearing on stipulated facts constitutes such an occasion, and (4) that permitting an appeal from a pretrial order will only encourage defendants to delay their motion to dismiss until jeopardy has attached.

These theories are unsound as a matter of law and policy and are inconsistent with holdings of this Court and policies reflected by the Double Jeopardy clause: (1) Jeopardy does not attach to an acquittal; on the contrary, the acquittal (or conviction) ends the jeopardy that attached upon the commencement of trial. (2) The doctrine of *res judicata* bars a second indictment only where the order dismissing the first indictment has not been successfully appealed or set aside; *res judicata* has no bearing on questions of appealability. (3) The Double Jeopardy Clause is applicable only where the defendant has been put to trial before a trier of fact capable of convicting him; the clause was plainly intended to limit the number of times a defendant could be *tried* for the same offense, but pretrial consideration of a legal issue on the basis of stipulated facts simply is not a trial. (4) Because the Double Jeopardy

Clause will not afford protection against a second trial where a defendant has deliberately allowed himself to be placed in jeopardy and then voluntarily asked the district court to terminate the trial on grounds that could have been determined prior to the time jeopardy attached, permiting an appeal from a pretrial order will not encourage defendants to delay their motions to dismiss until after jeopardy attaches. In any case, petitioner's argument goes not to the Double Jeopardy Clause but to the policy of the statute and is thus foreclosed by Congress's decision to permit the appeal.

There are, therefore, no sound reasons to depart from the well established rule—going back to the first holding of this Court to consider the issue [2]—that the United States may appeal from any pretrial order terminating a prosecution in favor of an accused.

ARGUMENT

I. THE CRIMINAL APPEALS ACT AUTHORIZES AN APPEAL TO A COURT OF APPEALS FROM ANY PRETRIAL ORDER DISMISSING AN INDICTMENT

The Criminal Appeals Act, 18 U.S.C. 3731, provides for an appeal by the United States to the court of appeals "from a decision, judgment, or order of a district court dismissing an indictment * * * except that no appeal shall lie where the double jeopardy clause * * * prohibits further prosecution." This explicit language, and the specific mandate of Congress that "[t]he provisions of this section shall be liberally construed to effectuate its purposes," were

[2] *Kepner* v. *United States*, 195 U.S. 100.

added by Congress in 1971 in order to overcome the restrictive construction that had been placed on the pre-1971 version of the Criminal Appeals Act.

Prior to the 1971 amendments, Section 3731 authorized an appeal to the court of appeals from "a decision or judgment setting aside, or dismissing any indictment * * * except where a direct appeal to the Supreme Court of the United States is provided by this section." This provision was generally construed as authorizing appeals to the court of appeals only from dismissals due to a defect in the indictment or in the institution of the prosecution. The legislative history of former Section 3731, which was said to reflect a policy against permitting appeals in criminal cases by the United States, was cited as justification for ignoring what was acknowledged to be the plain language of the old Criminal Appeals Act. See, *e.g.*, *United States* v. *Apex Distributing Company*, 270 F.2d 747 (C.A. 9); *United States* v. *DiStefano*, 464 F.2d 845, 847 (C.A. 2).

Accordingly, it was held that the United States could not appeal to the courts of appeals from pretrial orders dismissing indictments in cases in which the district court had determined on the basis of stipulated or undisputed facts that there was a valid defense to the indictment, as well as when the dismissal was for failure to prosecute or was predicated on the failure of the United States to comply with a discovery order. *United States* v.

Apex Distributing Company, supra, 270 F.2d at 751; *United States* v. *DiStefano, supra*, 464 F.2d at 848; *United States* v. *Ponto*, 454 F.2d 647 (C.A. 7); *United States* v. *Findley*, 439 F.2d 970 (C.A. 1).

Since many of these orders could not be appealed directly to this Court under the provisions of former Section 3731 (see *United States* v. *Sisson*, 399 U.S. 242),[3] and since often, when such an appeal was possible, the issue was not of sufficient importance to justify review by this Court, Congress determined to amend Section 3731 to "assure that the United States may appeal [to the court of appeals] from the

[3] The old Criminal Appeals Act, 18 U.S.C. (1964 ed.) 3731, provided in part:

> An appeal may be taken by and on behalf of the United States from the district courts direct to the Supreme Court of the United States in all criminal cases in the following instances:
>
> From a decision or judgment setting aside, or dismissing any indictment or information, or any count thereof, where such decision or judgment is based upon the invalidity or construction of the statute upon which the indictment or information is founded.
>
> From a decision arresting a judgment of conviction for insufficiency of the indictment or information, where such decision is based upon the invalidity or construction of the statute upon which the indictment or information is founded.
>
> From the decision or judgment sustaining a motion in bar, when the defendant has not been put in jeopardy.
> * * *

dismissal of a criminal prosecution by a district court in all cases where the Constitution permits." S. Rep. No. 91-1296, 91st Cong., 2d Sess., pp. 2-3.[4]

[4] Congress took particular notice of the manner in which the old Criminal Appeals Act had been construed (*id.* at 5-6):

> * * * [T]he Criminal Appeals Act, as interpreted today, does not provide for an appeal by the United States to any court in a large variety of cases where the dismissal is based on grounds having nothing to do with any defect in the indictment, or the construction or invalidity of the underlying statute. For example, if a court issues an order for discovery, believed to be unauthorized, a court will dismiss the indictment if the prosecutor refuses to comply. There is at present no way the prosecution can test the validity of that dismissal and the underlying order. If a court dismisses an indictment for lack of timely prosecution under the Federal Rules, without finding a denial of the constitutional right to a speedy trial, the Government has no right to appeal. * * * Also, the statute, passed at a time when the range of Federal prosecutions was considerably narrower, fails to take into account the current necessity of reviewing administrative records in connection with a criminal prosecution—an outgrowth of the tremendous expansion of administrative agencies, particularly the establishment of the Selective Service System, since 1907. This has given rise to situations which do not readily fit into categories of pleadings recognized at the time the act was first passed.

In fact, Congress indicated specifically its desire to provide for appeal in cases such as this (*id.* at 14):

> The problems of appealability have recently become especially serious in selective service cases where judges have reviewed defendants' selective service files before trials and dismissed the indictments after finding that there have been errors by the draft boards. *These are issues to be determined by a judge, not a jury, and there is no reason why they should not be subject to appellate review.* The question of whether actions such as those resulting in selective service case dismissals are appealable to courts of appeals, if appealable at all, is currently being litigated. If it should be decided that such appeals lie only to the Supreme Court, this will make it difficult for the Government to take appeals in a large number of selective service cases which ought to be reviewed, because such decisions often turn on special, narrow facts and thus are not sufficiently important to warrant an appeal to the Supreme Court. [Emphasis added.]

The Criminal Appeals Act, as amended, plainly carries out the expressed intention of Congress. Section 3731 now provides, in pertinent part:

> In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment or information as to any one or more counts, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution.

The Act contains no exception precluding appeals from dismissals on the merits that rest not upon the sufficiency of the indictment alone, but upon facts outside the indictment. In order to avoid just such a narrow reading of the new act, similar to the interpretation that had been imposed upon the old act by judicial gloss, Congress specifically directed in the new Section 3731 that "[t]he provisions of this section shall be liberally construed to effectuate its purposes." As the Senate Judiciary Committee observed, the "explicit expression of this intent" was added "in view of the restrictive judicial interpretations of congressional intent which have resulted from the histories of the earlier versions of section 3731 despite strong indications in the debate on the 1907 act that it should be broadly interpreted" (S. Rep. No. 91-1296, *supra*, at 18).[5]

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[5] We have referred extensively to this Senate Report because the amendments to the Criminal Appeals Act, which were enacted as part of the Omnibus Crime Control and Safe Streets Act of 1970, 84 Stat. 1880, were drafted by the Senate Judiciary Committee, and its "well considered and carefully prepared" report is particularly relevant in construing Section 3731. See *Schwegmann Brothers* v. *Calvert Distillers Corp.*, 341 U.S. 384, 395-396 (Jackson, J., concurring). We note, however, that while the amendments proposed by the Senate Judiciary Committee were adopted without change by the Senate, there was a modification made by the House-

Senate Conference Committee (H. Conf. Rep. No. 91-1768, 91st Cong., 2d Sess., p. 21).

The amendments to the Criminal Appeals Act as proposed by the Senate read as follows (S. Rep. No. 91-1296, *supra*, at 1):

> *Except as otherwise expressly provided by this section*, in a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment or order of a district court dismissing an indictment or information *or terminating a prosecution* in favor of a defendant as to any one or more counts, *except that no appeal shall lie from a judgment of acquittal.* [Emphasis added.]

The first and second italicized phrases were omitted altogether by the House-Senate Conference Committee, and the last phrase was modified so that the final version of the Act authorized an appeal from "a decision, judgment, or order of a district court dismissing an indictment or information as to one or more counts, but that no appeal shall lie in any case in which the Double Jeopardy Clause of the United States Constitution prohibits further prosecution." No explanation was given for the changes (H. Conf. Rep. No. 91-1768, *supra*, p. 21), but it may be surmised that they were intended to eliminate redundant language and more clearly express the intent of Congress.

The original version of the Act, providing that "no appeal shall lie from a judgment of acquittal," would have frustrated the expressed intent of the Senate Judiciary Committee to authorize appeals from pretrial dismissals of indictments based upon the application of legal principles to undisputed facts. The Committee also intended to authorize an appeal from such dismissals even after jeopardy attached (S. Rep. No. 91-1296, *supra*, at 11). These orders, however, had been characterized as "acquittals" for the purpose of determining their appealability under the old Criminal Appeals Act (see pp. 25-27, 34-35, *infra*), and accordingly there was a danger that the proviso to the Senate version of the Act would have been construed to bar an appeal from such orders. The language in the final version remedied that potential defect. Cf. *United States* v. *Pecora*, *supra*, 484 F.2d at 1293-1294, n. 6.

Accordingly, the courts of appeals are virtually unanimous in their agreement that the Criminal Appeals Act was intended to authorize an appeal from an indictment in all cases in which the Constitution would permit an appeal.[6] Moreover, while petitioner initially argued that the construction placed on Section 3731 by the court of appeals was "in violation of the clear import of the statute" (Pet. 5), he has now apparently abandoned that argument in the face of the language and legislative history of Section 3731.

II. THE DOUBLE JEOPARDY CLAUSE DOES NOT BAR AN APPEAL FROM A PRETRIAL DISMISSAL OF AN INDICTMENT

The principal issue raised here—in light of the clear expression of congressional intent to permit government appeals in all cases in which the Constitution permits—is whether the Double Jeopardy Clause bars an appeal by the United States from a pretrial order of the district court dismissing an indictment on the merits. Although petitioner had moved for and obtained a continuance of the trial pending the determination of his motion to dismiss the indictment, and although it is undisputed that a jury trial had

[6] *United States* v. *Jenkins*, 490 F.2d 868 (C.A. 2), certiorari granted, May 28, 1974, No. 73-1513; *United States* v. *Martin Linen Supply Co.*, 485 F.2d 1143 (C.A. 5), certiorari denied, February 19, 1974, No. 73-743; *United States* v. *Walker*, 489 F.2d 1353 (C.A. 7); *United States* v. *Brown*, 481 F.2d 1035 (C.A. 8). But cf. *United States* v. *Southern Railway Co.*, 485 F.2d 309 (C.A. 4); *United States* v. *Rothfelder*, 474 F.2d 606 (C.A. 6), certiorari denied, 413 U.S. 922.

not been waived and that petitioner was not in any jeopardy of conviction at the time the motion to dismiss was granted, petitioner argues "that because of the fact that the dismissal of the indictment was the functional equivalent of an acquittal on the merits, that constructively, jeopardy had attached" (Br. 5). This claim rests upon misconceptions of the history and language of the Double Jeopardy Clause, which, this Court has consistently held, does not come into play until the defendant has actually been placed in jeopardy by the empanelling of a jury (or, in non-jury trials, by the commencement of receipt of evidence). Moreover, petitioner's position receives no support from an examination of the significant considerations of policy that the guarantee against being "twice put in jeopardy" for the same offense is intended to reflect.

A. Jeopardy Does Not Attach In Pretrial Proceedings

Fundamentally, our position in this case comes down to a simple and, it seems to us, incontrovertible proposition: a defendant who has never been placed in jeopardy cannot avail himself of a claim of *double* jeopardy to block a goverment appeal.

The law is settled that jeopardy does not attach in pretrial proceedings that end in the dismissal of an indictment. This is so even when the dismissal is based on the insufficiency of the evidence or on a defense to the indictment that has the effect of ending the case and exculpating the defendant. In *Collins* v. *Loisel*, 262 U.S. 426, Mr. Justice Brandeis,

speaking for a unanimous Court, set out the basic rule from which this Court has never departed (*id.* at 429):

> The constitutional provision against double jeopardy can have no application unless a prisoner has, theretofore, been placed on trial. See *Kepner* v. *United States*, 195 U.S. 100, 126. The preliminary examination of one arrested on suspicion of a crime is not a trial; and his discharge by the magistrate upon such examination is not an acquittal. *Commonwealth* v. *Rice*, 216 Mass. 480. *People* v. *Dillon*, 197 N.Y. 254, 256. Even the finding of an indictment, followed by arraignment, pleading thereto, repeated continuances, and eventually dismissal at the instance of the prosecuting officer on the ground that there was not sufficient evidence to hold the accused, was held, in *Bassing* v. *Cady*, 208 U.S. 386, 391, not to constitute jeopardy.

This principle is reflected in numerous cases under the old Criminal Appeals Act, pursuant to which the United States could appeal directly to this Court from, *inter alia*, a "decision or judgment sustaining a motion in bar, when the defendant has not been put in jeopardy" (18 U.S.C. (1964 ed.) 3731). Although the "motion in bar" was never clearly defined (see *United States* v. *Sisson*, 399 U.S. 267, 300), it was generally held to encompass a pretrial order of the district court sustaining a defense to an indictment—on the basis of facts outside the indictment—the effect of which was "to end the cause and exculpate the defendants." *United States* v.

Hark, 320 U.S. 531, 536; *United States* v. *Blue*, 384 U.S. 251; see also *United States* v. *Murdock*, 284 U.S. 141; *United States* v. *Halseth*, 342 U.S. 277; *United States* v. *Covington*, 395 U.S. 57, 59, n. 2. Despite the fact that many of these pretrial orders were, in effect, dismissals on the merits and, under petitioner's analysis, "the functional equivalent of an acquittal," this Court repeatedly held that jeopardy had not attached because the defendants had not been put on trial. See, *e.g.*, *United States* v. *Celestine*, 215 U.S. 278, 283, holding that "[t]he defendant in this case had not been put upon trial, therefore he had not been in jeopardy"; *United States* v. *Blue*, 384 U.S. 251, 253, holding that since the defendant "had not yet been brought to trial and put in jeopardy when dismissal occurred * * * our jurisdiction under the statute is secure * * *."

Particularly significant, in view of petitioner's reliance on the contention that the order in this case was unappealable because it was the "functional equivalent of an acquittal," are the cases under former Section 3731 that entertained jurisdiction over appeals from pretrial orders dismissing indictments on the ground that the statute of limitations had run (*United States* v. *Goldman*, 277 U.S. 229; *United States* v. *Rabinowich*, 238 U.S. 78; *United States* v. *Barber*, 219 U.S. 72), even though such a pretrial dismissal on the merits has been characterized as an "acquittal." See *United States* v. *Barber*, 219 U.S. 77, 78; *United States* v. *Oppenheimer*,

242 U.S. 85, 88. Indeed, in *United States* v. *Zisblatt*, 172 F.2d 740 (C.A. 2), appeal dismissed, 336 U.S. 934, the court of appeals held that an appeal from a *post-trial* order of the district court that dismissed an indictment on statute of limitations grounds was not barred by the Double Jeopardy Clause.[7]

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[7] Speaking for the court, Judge Learned Hand wrote (172 F.2d at 743; footnotes omitted):

> * * * [T]he question becomes whether to reverse the dismissal and enter a judgment of conviction upon the verdict would violate the defendant's constitutional privilege. Had the trial judge directed a verdict, so that it would have been necessary upon reversal to subject the defendant to trial before a second jury, that would be "double jeopardy," but, although the Constitution gives an accused person the benefit of any mistakes in his favor of the first jury he encounters, whether it has passed upon his guilt or not, it does not extend that privilege to mistakes in his favor by judges. Indeed, were the opposite true, all appeals from decisions in arrest of judgment would be constitutionally futile because no judgment of conviction could be entered when they were reversed. So long as the verdict of guilty remains as a datum, the correction of errors of law in attaching the proper legal consequences to it do not trench upon the constitutional prohibition.

Having concluded, however, that it was without jurisdiction to hear the appeal because a direct appeal to this Court was mandated by the "motion in bar" provision of former

Accordingly, it is settled law that, regardless of the label attached to an order dismissing an indictment, the Double Jeopardy Clause does not bar an appeal where, as here, the order was entered prior to trial and the error may therefore be corrected without a retrial. Indeed, in *Kepner* v. *United States*, 195 U.S. 100, the case most frequently cited for the proposition that the Double Jeopardy Clause bars an appeal from an acquittal, the Court was careful to distinguish between appeals from acquittals rendered by a jury after a trial and appeals from pretrial orders terminating prosecutions (195 U.S. at 130-131):

> It is, then, the settled law of this court that former jeopardy includes one who has been acquitted by a verdict duly rendered, although no judgment be entered on the verdict, and it was found upon a defective indictment. The protection is not, as the court below held, against the peril of second punishment, *but against being again tried for the same offense.*
>
> We are not here dealing with those statutes which give to the Government a right of review upon the steps merely preliminary to a trial and before the accused is legally put in jeopardy, as where a discharge is had upon motion to quash or a demurrer to the indictment is sustained before jeopardy has attached. Such statutes have been quite generally sustained in jurisdictions which deny the right of second trial where a competent court has convicted or acquitted the accused. *People* v. *Webb*, 38 California, 467. [Emphasis added.]

Section 3731, the court of appeals certified the case to this Court. The appeal was dismissed on the motion of the Solicitor General solely on the ground that the *statute* did not authorize an appeal from a post-jeopardy order. See *United States* v. *Sisson*, *supra*, 399 U.S. at 306.

See also *United States* v. *Taylor*, 207 U.S. 120, 127, where, in an opinion by Mr. Justice Holmes, the Court rejected a challenge to the right of the United States to appeal from a pretrial order terminating a prosecution in favor of the accused, indicating that there is no constitutional appealability problem prior to jeopardy:

> If the Fifth Amendment has any bearing, the act of 1907 [permitting an appeal] is directed to judgments rendered before the moment of jeopardy is reached. *Kepner* v. *United States*, 195 U.S. 100, 128. We think it is unnecessary to discuss the question at length.

United States v. *Sisson*, 399 U.S. 267, upon which petitioner principally relies, does not dictate a contrary result. There, unlike the instant case, the district court entered a *post-trial* order, which it denominated as an order "in arrest of judgment," in which it terminated the prosecution in favor of the defendant. The determination in *Sisson* that the government could not appeal from this order, because it was "in fact an acquittal," was predicated on the fact that the order of the district court was "bottomed on factual conclusions not found in the indictment but instead made on the basis of evidence adduced at the trial" (*id.* at 288). Accordingly, it

was held that the judge's action could not be distinguished from a directed judgment of acquittal entered notwithstanding a jury verdict of guilty under Rule 29(b) of the Federal Rules of Criminal Procedure (399 U.S. at 290) and that an appeal could not be taken from such a post-jeopardy order.

Here, on the other hand, the criminal prosecution was aborted prior to trial and before jeopardy attached. Even under the definition of an acquittal in *Sisson*—"a legal determination on the basis of facts adduced at the trial relating to the general issue of the case * * *" (*id.* at 290, n. 19)—the district court order here was not an acquittal. Since there was no trial, the dismissal was not a legal determination on "the basis of facts adduced at the trial."

Indeed, the motion to dismiss in this case was governed by Rule 12(b)(1), rather than Rule 29. Rule 12(b)(1) provides:

> Any defense or objection which is capable of determination without the trial of the general issue may be raised before trial by motion.

"A defense is thus 'capable of determination' if *trial* of the facts surrounding the commission of the alleged offense would be of no assistance in determining the validity of the defense." *United States* v. *Covington*, 395 U.S. 57, 60 (emphasis added). Here the district court (as distinct from the jury) had jurisdiction to determine a "defense" based on a claim that the local board improperly refused to reopen petitioner's classification; this was so precisely

because the claim was "capable of determination" without a trial of "the facts surrounding the commission of the alleged offense." In contrast to *Sisson*, where in order to determine the defense raised—whether the defendant was improperly denied treatment as a conscientious objector—the district court was required to consider "Sisson's testimony and demeanor at the trial" (399 U.S. at 301), here the facts upon which the pretrial order was based were undisputed and did not involve "the trial" of any issue of fact.

The "acquittal" rationale of *Sisson* is, therefore, plainly inapposite here (assuming *arguendo* that *Sisson's* conclusion that an appeal did not lie from an "acquittal" was based on the Double Jeopardy Clause[8]). Moreover, since the order in *Sisson* termi-

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[8] The holding of the Court in *Sisson* was that the order was an "acquittal" for the purpose of determining "this Court's jurisdiction over the appeal under 18 U.S.C., 3731 [1964 ed.]." *United States* v. *Jorn*, *supra*, 400 U.S. at 478, n.7. See also *id.* at 475-476; *United States* v. *Findley*, *supra*, 439 F.2d at 973. And it is plain from the legislative history of the 1971 amendments to the Criminal Appeal Act that Congress intended to overrule the construction that *Sisson* placed on former Section 3731. ("One example of the kind of case which would thereby be made appealable is the Sisson case" (S. Rep. No. 91-1296, *supra*, at 11)).

There is, as petitioner observes (Br. 8), also dictum in the opinion in *Sisson* to the effect that the Double Jeopardy Clause barred an appeal from the "acquittal" (399 U.S. at 290) even though the legal error could be corrected without a second trial. But this language, as we have shown, would not avail petitioner here, because it is limited to *post-trial* "acquittals." Indeed, in *United States* v. *Jenkins*, 490 F.2d 868 (C.A. 2), certiorari granted, May 28, 1974, No. 73-1513, which involved a post-trial order similar to that in *Sisson*, and

nating the prosecution was a post-trial and post-jeopardy order, it does not in any way undermine the basic rule summarized by Mr. Justice Brandeis in *Collins* v. *Loisel*, *supra*, 262 U.S. at 429, that "[t]he constitutional provision against double jeopardy can have no application unless a [defendant] has, theretofore, been placed [in jeopardy]."[9]

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where the Court of Appeals for the Second Circuit held that the Double Jeopardy Clause barred an appeal, it expressly left open the issue whether a similar result would apply to a pretrial order dismissing an indictment on the merits (490 F.2d at 880). Subsequently, in *United States* v. *Velazquez*, 490 F.2d 29 (C.A. 2), petition for a writ of certiorari pending (No. 73-6193), the court of appeals held that an appeal from a pre-trial order similar to that in the instant case was not barred by the Double Jeopardy Clause.

[9] *United States* v. *Brewster*, 408 U.S. 501, upon which petitioner relies (Br. 9), is likewise inapposite because it dealt solely with the issue whether "this Court has jurisdiction under 18 U.S.C. § 3731 (1964 ed., Supp. V) to review the District Court's [pretrial] dismissal" of the indictment (408 U.S. at 504-505). In resolving this issue, and in ultimately sustaining its jurisdiction to hear the appeal by the United States, the Court in *Brewster* relied upon language in *Sisson* that, under the former Section 3731, an appeal would not lie from a dismissal "on the basis of facts that would necessarily be tried with the general issue in the case" (399 U.S. at 301).

Since that portion of the opinion in *Sisson* was based solely on the old Criminal Appeals Act, it is not relevant here. Indeed, in *United States* v. *Findley*, *supra*, cited with approval in *Brewster* (408 U.S. at 506) and relied upon by petitioner (Br. 9-10), the First Circuit characterized the holding in *Sisson* as follows (439 F.2d at 973):

> Collectively we believe this [the rationale of *Sisson*] was an approach not in terms of double jeopardy, but in terms of the kind of error section 3731 was intended to cover.

B. Allowance of Government Appeals From Pretrial Dismissal Orders Is Consistent with the Purposes of the Double Jeopardy Clause

A consideration of the nature and the purposes of the Double Jeopardy Clause clearly establishes that its objectives are fully consistent with the accepted and long-standing constitutional precedents discussed above permitting a government appeal in cases such as this.

The Double Jeopardy Clause was intended to protect an individual from being subjected to trial and possible conviction more than once for the same offense. A power "to subject the individual to repeated prosecutions for the same offense," as the Court held in *United States* v. *Jorn*, 400 U.S. 470, 479, "would cut deeply into the framework of procedural protections which the Constitution establishes for the conduct of a criminal trial. And society's awareness of the heavy personal strain which *a criminal trial* represents for the individual defendant is manifested in the willingness to limit the Government to a single criminal proceeding to vindicate its very vital interest in enforcement of criminal laws" (emphasis added). These considerations were summarized by Mr. Justice Black in *Green* v. *United States*, 355 U.S. 184, 187-188, where, writing for the Court, he observed:

> The constitutional prohibition against "double jeopardy" was designed to protect an individual from being subjected *to the hazards of trial and possible conviction more than once for an alleged offense.* In his Commentaries, which

greatly influenced the generation that adopted the Constitution, Blackstone recorded:

> ". . . the plea of *auterfoits acquit*, or a former acquittal, is grounded on this universal maxim of the common law of England, that no man is to be brought into jeopardy of his life more than once for the same offence."

Substantially the same view was taken by this Court in *Ex parte Lange*, 18 Wall. 163, at 169:

> "The common law not only prohibited a second punishment for the same offence, but it went further and forbid *a second trial* for the same offence, whether the accused had suffered punishment or not, and whether in the former trial he had been acquitted or convicted."

The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty. [Emphasis added; footnotes omitted.]

These considerations "have led this Court to conclude that a defendant is placed in jeopardy in a criminal proceeding once the defendant is put to trial before the trier of the facts, whether the trier be a jury or a judge." *United States* v. *Jorn*, *supra*, 400 U.S. at 479.

Applying this basic rule, and the considerations that led the Court to adopt it, it is plain that petitioner here was not in jeopardy of conviction during the hearing and determination of the motion to dismiss the indictment. Petitioner had yet to be tried on the offense for which he was indicted. Since neither he nor the United States had consented to waive trial by jury, the district court was without power under the Constitution to make any determination regarding petitioner's guilt or innocence or to conduct a trial on any disputed factual issue (*Patton* v. *United States*, 281 U.S. 276, 312; see also Fed. R. Crim. P., Rules 12 and 23).

Moreover, the hearing and determination of the motion to dismiss cannot be characterized as a trial, because there were no disputed issues of fact that had to be tried or resolved. All of the material facts were uncontroverted and established by petitioner's affidavit and by the documents (the authenticity of which was not challenged) contained in his Selective Service file. Petitioner admittedly failed to report for induction as ordered; he concededly filed a post-induction-order claim for treatment as a conscientious objector, and the local board concededly refused to reopen his classification for the reasons stated in the Selective Service File. The only controversy resolved by the district court was the purely legal issue whether the allegedly improper manner by which the local board declined to reopen petitioner's classification would constitute a defense to the indictment.

Under these circumstances, it is apparent that none of the crucial policy consideration reflected by the Double Jeopardy Clause are implicated here. Peti-

tioner was not subjected to the "heavy personal strain which a criminal trial represents for the individual," nor was he subject to the "embarrassment, expense and ordeal" of a trial. Moreover, there is no possibility that, even though innocent, he has been sapped of "the stamina or resources" effectively to face the trial that the court of appeals directed here. See Friedland, *Double Jeopardy* 4 (1969).[10] Indeed, petitioner's motion to postpone the trial until the determination of the motion to dismiss shows clearly—if any such showing is necessary—that petitioner was fully aware of the limited nature of the proceedings involved in the hearing and determination of his motion to dismiss. There is, therefore, no basis for petitioner's claim that constructively "jeopardy had attached."

C. Petitioner Has Advanced No Convincing Arguments For Overruling The Well Settled Principle That Jeopardy Does Not Attach Until A Trial Has Commenced

Petitioner's brief largely ignores the overwhelming authority sustaining the right of the United States to appeal from the pretrial order dismissing the indictment here. The arguments he does advance are principally derived from the opinions of some courts

[10] Certainly there was far less of a "trial" here than is frequently present when a hearing is held on a pretrial motion to suppress evidence, which often involves disputed issues of fact and where the outcome of the hearing may well determine whether there is going to be a trial. Yet it has never been suggested that an appeal from the granting of such a motion is barred by the Double Jeopardy Clause.

of appeals which have held or suggested that the Double Jeopardy Clause does not permit an appeal from a pretrial order dismissing an indictment on the merits. These cases have suggested, among other things, (1) that jeopardy attaches to an acquittal; (2) that the doctrine of *res judicata*, which is applicable to criminal as well as civil proceedings, bars an appeal by a party from an adverse judgment; (3) that the Double Jeopardy Clause was not intended to limit the number of times a defendant may be summoned into court on a single offense, but rather the number of times he may be required to submit proof of his innocence to challenge by the prosecution; and (4) that permitting an appeal from a pretrial order will only encourage defendants to delay their motions to dismiss until jeopardy has attached.

These theories are unsound as a matter of law and policy, and their adoption to bar an appeal from the pretrial order here would involve a repudiation of virtually every relevant opinion of this Court construing the Double Jeopardy Clause.

a. The leading case supporting petitioner's claim, which has been followed by some courts of appeals and rejected by others, is *United States* v. *Ponto*, 454 F.2d 657 (C.A. 7; rehearing *en banc*). There, as here, the defendant was indicted for failing to report for induction as ordered. He moved to dismiss the indictment prior to trial on the basis of a defense that was supported by the undisputed facts contained in his Selective Service File. The motion to dismiss was

granted, and the United States appealed to the court of appeals pursuant to the old Criminal Appeals Act.

By a vote of 5 to 4, the Court of Appeals for the Seventh Circuit construed the old Criminal Appeals Act to preclude an appeal by the United States. The plurality opinion, on behalf of three judges, alternatively held that an appeal was barred by the Double Jeopardy Clause (454 F.2d at 663-664):

> Since the dismissal order was based on a determination on the merits, it was an acquittal to which jeopardy attached. *United States* v. *Sisson, supra*, 399 U.S. at 289-290, 90 S.Ct. 2117; *United States* v. *Ball*, 163 U.S. 662, 16 S.Ct. 1192, 41 L. Ed. 300 (1896); *Green* v. *United States*, 355 U.S. 184, 78 S.Ct. 221, 2 L. Ed. 2d 199 (1957); *Helvering* v. *Mitchell*, 303 U.S. 391, 398, 58 S.Ct. 630, 82 L. Ed. 917 (1938). See *United States* v. *Jorn*, 400 U.S. 470, 479, 91 S. Ct. 547, 27 L.Ed. 2d 543 (1971). Thus, government appeal from this ruling would violate the double jeopardy clause of the Fifth Amendment since a retrial on the charge would be prohibited. *Kepner* v. *United States*, 195 U.S. 100, 24 S.Ct. 797, 49 L.Ed. 114 (1904); *United States* v. *Ball, supra*. We view this as an independent ground for holding that the government may not appeal in this case [footnote omitted].[11]

[11] *Accord: United States* v. *Southern Railway Co.*, 485 F.2d 309 (C.A. 4); *United States* v. *Rothfelder*, 474 F.2d 606 (C.A. 6); *United States* v. *McCreery*, 473 F.2d 1381 (C.A. 7); *United States* v. *Lewis*, 492 F.2d 126 (C.A. 5). *Contra: United States* v. *Velazquez*, 490 F.2d 29 (C.A. 2), petition for a writ of certiorari pending (No. 73-6493); *United States* v. *Martin Linen Supply Co.*, 485 F.2d 1143 (C.A. 5), certiorari denied, February 19, 1974, No. 73-743; *United States* v. *Brown*, 481 F.2d 1035, 1041 (C.A. 8).

This analysis is based upon a number of erroneous assumptions.

The suggestion that jeopardy "attaches to an acquittal" is fundamentally inconsistent with every decision of this Court construing the Double Jeopardy Clause. Indeed, in *Green* v. *United States*, 355 U.S. 184, 188, the Court spoke of an acquittal as "ending a defendant's jeopardy," which, of course, had attached upon the commencement of trial. *United States* v. *Sisson, supra*, as we have shown, did not hold otherwise. The dictum relied upon by the court of appeals in *Ponto* merely states that an acquittal entered *after* jeopardy had attached barred an appeal. Moreover, as we have shown, the Double Jeopardy Clause—in which the word acquittal is nowhere to be found—was "designed to protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense" (*Green* v. *United States, supra*, 355 U.S. at 187), and this protection is afforded regardless of whether a defendant has been acquitted *or* convicted. Because jeopardy is deemed to attach upon the empanelling of a jury (or the taking of evidence where a jury trial has been waived), rather than upon the return of a verdict, the Double Jeopardy Clause affords protection against a second trial even where the first trial did not end in an acquittal or conviction, if it was terminated improperly prior to a verdict.

Accordingly, to the extent that an appeal from an "acquittal" is barred by the Double Jeopardy Clause, it is only where the "acquittal" has been returned by the trier of fact, and a ruling against the defendant on appeal would require a "retrial." [12] The point was emphasized in *Green* v. *United States*, *supra*, cited by the court of appeals in *Ponto*, where it was stated (355 U.S. at 188):

> In accordance with this philosophy [underlying the Double Jeopardy Clause] it has long been settled under the Fifth Amendment that a *verdict* of acquittal is final, ending a defendant's jeopardy, and even when "not followed by any judgment, is a bar to a subsequent prosecution for the same offence." *United States* v. *Ball*, 163 U.S. 662, 671. Thus it is one of the elemental principles of our criminal law that the Government cannot secure a new trial by means of an appeal even though an acquittal may appear to be erroneous. *United States* v. *Ball*, *supra*; *Peters* v. *Hobby*, 349 U.S. 331, 344-345. Cf. *Kepner* v. *United States*, 195 U.S. 100; *United States* v. *Sanges*, 144 U.S. 310.[13]

[12] The English rule, from which the Double Jeopardy Clause was derived, is to the same effect. "[T]he common law plea of *autrefoits acquit* was based on a verdict of a jury, and not on the 'equivalent of an acquittal.'" Kirk, *"Jeopardy" During The Period Of The Year Books*, 82 U. Pa. L. Rev. 602, 603-604 (1934). The English common law rule would permit a retrial whenever the trial was terminated prior to verdict regardless of the reason for termination.

[13] The other cases cited by the court of appeals (except for the *Sisson* dictum) are likewise to the same effect.

While the court of appeals in *Ponto* recognized that it is the prohibition against a "retrial" that bars an appeal from a verdict of acquittal (it held that an "appeal from this ruling would violate the double jeopardy clause * * * since a retrial on the charge would be prohibited" (454 F.2d at 664)), it completely ignored the fact that the defendant had never been tried on the indictment and had never been placed in jeopardy of conviction. A successful appeal, therefore, could not have resulted in a "retrial." Accordingly, Ponto was not only never in jeopardy, as that term has been applied, but none of the considerations of policy reflected by the Double Jeopardy Clause, discussed above, were implicated by the appeal taken by the United States from the pretrial order dismissing his indictment.

It is not surprising, in light of these facts, that the reasoning in *Ponto*, set out and discussed above, did not command a majority of the court of appeals,[14] and that it has been distinguished by recent cases to the point where the Seventh Circuit recently indicated that "the present viability of *Ponto*" is an open question. *United States* v. *Williams*, 491 F.2d 1233, 1234 (C.A. 7); *United States* v. *Walker*, 489 F.2d 1353 (C.A. 7).[15]

[14] Only three of five judges who formed the majority in *Ponto* agreed that the Double Jeopardy Clause barred an appeal because the order of dismissal was "an acquittal to which jeopardy attached."

[15] In *Walker* and *Williams*, the Court of Appeals for the Seventh Circuit held that the rationale of *Ponto* was applicable

b. A second line of authority relied upon by petitioner is represented by the concurring opinion in *United States* v. *Ponto*, *supra*, and by *United States* v. *Hill*, 473 F.2d 759 (C.A. 9). In *Ponto*, two of the five judges concurred on the ground that "the order of the district court appealed from was a dismissal with prejudice and had the effect of barring a second prosecution. *White* v. *United States*, 126 U.S. App. D.C. 309, 377 F.2d 948 (1967); see *United States* v. *Oppenheimer*, 242 U.S. 85, 87, 37 S.Ct. 68, 61 L. Ed. 161, 1916" (454 F.2d at 665).

Similarly, in *United States* v. *Hill*, *supra*, which involved an obscenity prosecution, the defendant moved to dismiss the indictment prior to trial on the ground that the materials were not obscene. A pretrial "hearing" was held at which the defendants

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to a pretrial order dismissing an indictment on the merits only where the order, in effect, "sustained the merits of an affirmative defense." *United States* v. *Walker*, *supra*, 489 F.2d at 1335; *United States* v. *Williams*, *supra*, 491 F.2d at 1234, n.2. The rationale was held to be inapplicable where the dismissal of the indictment is based upon a stipulated set of facts in which the government "reveals the facts it is prepared to prove" (489 F.2d at 1356). Such a dismissal, the court of appeals reasoned, was in effect a determination of the sufficiency of the charge in the indictment and appealable (*ibid.*, citing *United States* v. *Fruehauf*, 365 U.S. 146, 157-158).

While *Walker* and *Williams* are factually distinguishable from *Ponto* on those grounds, it is difficult to rationalize the distinction on the basis of the purpose of the Double Jeopardy Clause and the policies which it reflects. We think it clear, as the court of appeals held in the instant case, that there is "no significant constitutional difference between the two situations" (Pet. App. 25).

"introduced" into evidence the allegedly obscene materials, along with materials (taken from the records of other cases) that had previously been adjudicated as not being obscene. The United States in turn "offered" materials (taken from the record of yet another case) that had been found to be obscene. (See 473 F.2d at 760.) Although a jury trial had not been waived and the district court was incapable of entering a judgment of acquittal or conviction as a result of the hearing, and although no issue of fact was tried, the court of appeals held that appellate review of the "pre-trial determination that the materials * * * were not obscene as a matter of law" (473 F.2d at 760-761) could not be obtained by the United States.

In so doing, it relied upon *United States* v. *Oppenheimer*, 242 U.S. 85. There, an indictment had been dismissed on the ground that the charge was barred by the statute of limitations. Subsequently, as the result of an appeal by the United States from a pretrial dismissal of an indictment in another case,[10] it became clear that the dismissal of the indictment against Oppenheimer had been erroneous. A new indictment was then returned against Oppenheimer, and he was convicted. On appeal, the conviction was reversed on the ground that the prior dismissal of the indictment on the merits was *res judicata* and barred a subsequent prosecution for the same offense.

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[10] *United States* v. *Rabinowich*, 238 U.S. 78.

Speaking for the Court, Mr. Justice Holmes wrote (242 U.S. at 87):

> A plea of the statute of limitations is a plea to the merits, *United States* v. *Barber*, 219 U.S. 72, 78, and however the issue was raised in the former case, after judgment upon it, it could not be reopened in a latter prosecution. * * *

The Court specifically recognized that its ruling was not based on the Double Jeopardy Clause, which, since judgment had been rendered prior to trial, was by its terms inapplicable to bar a subsequent indictment. Instead the Court held that the doctrine of *res judicata* was applicable to criminal as well as civil cases (*id.* at 88):

> The safeguard provided by the Constitution against the gravest abuses has tended to give the impression that when it did not apply in terms, there was no other principle that could. But the Fifth Amendment was not intended to do away with what in the civil law is a fundamental principle of justice (*Jeter* v. *Hewitt*, 22 How. 352, 364), in order, when a man once has been acquitted on the merits, to enable the Government to prosecute him a second time.

The principal defect in the reasoning in *Hill* and the concurring opinion in *Ponto*, and in the reliance of both upon *United States* v. *Oppenheimer*, *supra*, is that it is based upon a fundamental misconception of the doctrine of *res judicata*. While it may be that a pretrial dismissal of an indictment on the merits—once final—bars a second indictment for the same offense,

it has never been held that an appeal from the dismissal of the original indictment, which seeks its reinstatement, is similarly barred. So, for example, while in *United States* v. *Oppenheimer*, 242 U.S. 85, it was held that under the doctrine of *res judicata* a final (unappealed) order dismissing an indictment on statute of limitations grounds barred a second prosecution for the same offense, this Court (before and after *Oppenheimer*) has entertained appeals from pretrial orders dismissing indictments on statute of limitations grounds. *United States* v. *Goldman*, 277 U.S. 229; *United States* v. *Rabinowich*, 238 U.S. 78; *United States* v. *Barber*, 219 U.S. 72, 77-78. See also *United States* v. *Zisblatt*, 172 F.2d 740 (C.A. 2), appeal dismissed, 336 U.S. 934. Similarly, while it was held in *White* v. *United States*, 377 F.2d 948 (C.A.D.C.) (cited in the concurring opinion in *Ponto*), that a pretrial (unappealed) order dismissing an indictment with prejudice because of unnecessary delay in prosecution barred a second indictment for the same offense, this Court has held that an order dismissing an indictment on those grounds is appealable. *United States* v. *Marion*, 404 U.S. 307.

Indeed, the "fundamental principle of justice" in the civil law that Mr. Justice Holmes applied in *United States* v. *Oppenheimer*, the doctrine of *res judicata*, assumes the right of a party to appeal from an adverse judgment; and if the judgment is reversed by an appellate court, "it is no longer conclusive between *the parties*." ALI, *Restatement of the Law of Judgments*, § 41(d), p. 163 (1942). Cf. *United States* v.

Kepner, 195 U.S. 100, 134-137 (Holmes, J. dissenting). Were it otherwise, the entire jurisdiction of appellate courts would be eradicated by the doctrine of *res judicata*.

Moreover, not only did the decision in *Hill* and the concurring opinion in *Ponto* completely misapply the doctrine of *res judicata*, they also ignored the fact that this doctrine as applied to pre-jeopardy rulings on the merits is not mandated by the Double Jeopardy Clause, but is simply a common law rule of procedure that Congress is entirely free to modify by statute.[17] And it has done so here.

It is no answer to say, as the majority did in *Hill*, that while "[i]t may be that in *Oppenheimer* the Court was applying *res judicata* or collateral estoppel rather than, or as much as, double jeopardy, although that is by no means clear,[18] [t]he distinction, if any, is immaterial" because *Ashe* v. *Swenson*, 397 U.S. 436, 445, subsequently held that "the principle of collateral estoppel is embodied in the Fifth Amendment guarantee against double jeopardy" (473 F.2d

[17] Arguably, allowing a successive number of indictments without limitation, where previous indictment have been dismissed on the merits, may raise due process problems. Such problems, however, are not presented by permitting a single appeal from a pretrial order dismissing an indictment on the merits. See *Palko* v. *Connecticut*, 302 U.S. 319.

[18] Although it was "by no means clear" to the court of appeals in *Hill*, subsequent opinions of this Court have consistently treated *Oppenheimer* as applying the doctrine of *res judicata*. See *United States* v. *Jorn*, 400 U.S. 470, 475, n. 5; *Ashe* v. *Swenson*, 397 U.S. 436, 443; *United States* v. *Adams*, 281 U.S. 202, 205; *Collins* v. *Loisel*, 262 U.S. 426, 430.

at 762). *Ashe* v. *Swenson* merely held that, when a verdict of acquittal entered by a jury necessarily determined certain facts in favor of an accused, the Double Jeopardy Clause could not be avoided by charging the defendant with another offense the proof of which required relitigation of the same factual issue that the prior proceeding, in which he had been placed in jeopardy, had resolved in the defendant's favor.[19] It does not follow from this that an appeal from the termination of the prosecution prior to trial, before jeopardy attached, is barred. Indeed, it is a settled part of the doctrine of collateral estoppel that "[i]f a judgment rendered by a court of first instance is reversed by the appellate court and a final judgment is entered by the appellate court or by the court of first instance in pursuance of the mandate of the appellate court, this latter judgment is conclusive between the parties." ALI, *Restatement of Judgments*, § 69, p. 315 (1942); *Partmar Corp.* v. *Paramount Corp.*, 347 U.S. 89, 99, n. 6.

In sum, the rationale of *United States* v. *Hill* and of the concurring opinion in *Ponto* is as unsound as the rationale of the plurality opinion in *Ponto* and the cases that have followed it. Neither affords a sound basis for overturning the settled doctrine that

[19] The issue in *Ashe* v. *Swenson* was stated by the Court in the following way (397 U.S. at 446):

> The question is * * * simply whether, after a jury determined by its verdict that the petitioner was not one of the robbers, the state could constitutionally hale him before a new jury to litigate that issue again.

jeopardy does not attach until a trial has begun, and that an appeal from a pretrial order of dismissal on the merits is not barred by the Double Jeopardy Clause.

c. A third source of authority invoked by petitioner is *United States* v. *Velazquez*, 490 F.2d 29 (C.A. 2), petition for a writ of certiorari pending (No. 73-6493). Although the court of appeals there held, in a case closely resembling the instant case on its facts, that the Double Jeopardy Clause did not bar an appeal, petitioner relies on the reasoning of the majority opinion in *Velazquez* in support of his position here. That opinion stated (490 F.2d at 34):

> The underlying thrust of the protection against double jeopardy is thus not to limit the number of times a defendant may be summoned into court on a single offense. Under present law this may be done repeatedly. It is rather to limit to one the number of times that a defendant may be required to submit proof of his innocence to challenge or acceptance by the other side. This expresses the root function of the trial as a proceeding where litigants are to be heard before a neutral tribunal, where they appear and argue as adversaries and where their case is to be subjected to public scrutiny and is open to rebuttal. It is multiple trials in this sense which the double jeopardy clause is designed to prevent. [Footnote omitted.]

Holding that the Double Jeopardy Clause did not bar an appeal from the order dismissing the indictment against Velazquez, the court of appeals observed (*id.* at 34-35):

> The district court's granting of Velazquez' motion presented a different situation. There was no trial. There was no evidentiary hearing. There was, in fact, no introduction of evidence as commonly understood in our adversarial system. There was no stipulation of facts. Rather the court went to the motion papers of the defendant, which included copies of entries in his Selective Service record, and without giving either side an opportunity to be heard, and without even having the defendant appear in open court, concluded as a matter of law that the defendant had been deprived of due process * * * [and that the indictment should be dismissed].

Since a different result would presumably have followed in *Velazquez* if the Selective Service file had been "offered" in evidence at a hearing or if the parties had stipulated to the facts,[20] petitioner argues that *Velazquez's* reasoning is applicable to the instant case because the United States Attorney conceded at oral argument that petitioner's letter to his local board—which was part of the Selective Service file—established a prima facie claim for treat-

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[20] The court of appeals' reasoning regarding a dismissal on the basis of stipulated facts was as follows (490 F.2d at 34, n.16):

> That an adjudication on stipulated facts would bar retrial is in keeping with this policy of openness. In such an instance facts have again been offered to the other side and made part of the public record, with the only difference that instead of inviting challenge they have engendered acquiescence. But at least both sides have had the opportunity to pass upon them in the process of submission to the court. * * *

ment as a conscientious objector (Br. 9). But this was not a stipulation of fact; it was simply a concession regarding the legal consequences of an undisputed fact.

In any event, the "ethereal quality of the distinction drawn by the *Velazquez* majority," as Chief Judge Kaufman aptly phrased it in his dissenting opinion in *Velazquez* (490 F.2d at 41),[21] is based largely on a misunderstanding of the purpose of the Double Jeopardy Clause and a patently erroneous reading of the holdings of this Court.

Without belaboring what was said earlier, jeopardy does not attach until a trial has begun before a trier of facts capable of convicting the defendant of the crime charged.[22] *Velazquez* suggests that a hearing on

[21] Chief Judge Kaufman would have adopted the *Ponto* rationale and would have dismissed the appeal because the order of the district court was an "acquittal." It is fundamental," he observed, "that a defendant, once acquitted, may not *again* be placed in jeopardy for the same alleged crime" (490 F.2d 39, emphasis added). Chief Judge Kaufman, however, did not explain when Velazquez had been *initially* placed in jeopardy.

[22] The court of appeals in *Velazquez* observed (490 F.2d at 33):

> The Supreme Court has recently cautioned that the question of assessing whether jeopardy attaches is not to be decided by any mechanical test. *Illinois* v. *Somerville*, 410 U.S. 458 * * * (1973); *United States* v. *Jorn*, 400 U.S. 470 * * * (1971); *United States* v. *Sisson*, 399 U.S. 267 * * * (1970). Accordingly, it is not wholly dispositive of the claim raised by Velazquez to state that since the jury was neither waived nor empaneled, jeopardy could not have attached, although this gives rise to a strong presumption. * * *

a pretrial motion to dismiss is to be deemed a "trial" to which jeopardy attaches when it takes the form of a "hearing before a neutral tribunal, where [the parties] appear and argue as adversaries, and where their case is to be subject to public scrutiny." This cannot be correct, however; if it were, then it would logically follow that, even upon the *denial* of such a pretrial motion to dismiss—after oral argument on the motion or upon a stipulated set of facts—the defendant could not be tried, despite the conclusion of the district court that he has no defense to the indictment, because the trial itself would constitute a second jeopardy. Such a result is absurd because in reality—whatever the nature of the pretrial proceedings—the parties are simply agreeing to the facts for the limited purpose of resolving a controlling issue of law without going through the burden, expense, and emotional strain of a trial.

We disagree. We have already demonstrated that the test for determining when jeopardy has attached—the commencement of a trial reflects the considerations underlying the Double Jeopardy Clause. Accordingly while clear and precise, it is not "mechanical" in any invidious sense. Moreover, there is nothing in any of the cases cited by the court of appeals which questions that basic test. *Sisson* and *Jorn* both involved orders entered after the commencement of trial, and both restated the settled rule. *Somerville* merely cautioned that there is no "mechanical formula by which to judge the propriety of declaring a mistrial" after jeopardy attached (410 U.S. at 462). It did not question the settled rule "that jeopardy 'attached' when the first jury was selected and sworn" (410 U.S. at 467).

Moreover, even assuming the rationale of *Velazquez* is otherwise valid, it is difficult to understand how a defendant who takes advantage of such a pretrial motion has been "required to submit proof of his innocence" (490 F.2d at 34). Not only is the pretrial proceeding initiated by the defendant, but (depending on the resolution of the legal issue) the proof he submits may establish his guilt rather than his innocence. In the instant case, for example, as is true in most selective service cases, the principal "proof" is the Selective Service file. That file establishes conclusively that petitioner failed to report for induction as ordered. Whether it also establishes a defense to the charge depends upon the resolution of the legal issue, which is the only subject of controversy. There is no reason in law or policy why the district court should have unreviewable authority to resolve that issue.

Indeed, had petitioner been convicted after a trial, and had the court of appeals reversed the judgment of conviction (on the same grounds relied upon by the district court), there would be no doubt about the right of the United States to seek further review. Yet petitioner argues, and *Velazquez* suggests, that an appeal from a pretrial order dismissing an indictment may be barred by the Double Jeopardy Clause. Such anomalous reasoning hardly justifies a departure from the settled construction of the Double Jeopardy Clause upon which the court below relied in upholding the right of the United States to appeal from the pretrial order dismissing the indictment.

The final authority relied upon by petitioner is *United States* v. *Findley*, 439 F.2d 970 (C.A. 1), which was decided under the pre-1971 version of the Criminal Appeals Act. There the court of appeals suggested that as a matter of policy it was unwise to permit appeals from pretrial orders granting dismissals (*id.* at 974):

> * * * If an appeal will lie in the present case, while it cannot if the defendant waits and subjects himself to jeopardy, informed counsel believing they have a defense on the merits will henceforth protect their clients by avoiding an expediting procedure otherwise beneficial to all concerned, and only ignorant and ill-advised defendants will subject their defense on the merits to a government appeal. We will not adopt such a penalizing construction of the statute.

This consideration of policy, which the court of appeals found persuasive in construing the *old* Criminal Appeals Act, is beside the point here, since it is clear that Congress intended to overrule cases such as *Findley* when it amended the Act in 1971.

In addition, there is a fundamental defect in the reasoning of the court of appeals in *Findley*. It assumes—we believe erroneously—that a defendant who is afforded an opportunity to obtain a determination of a legal defense prior to trial and nevertheless knowingly allows himself to be placed in jeopardy before raising the defense may assert the Double Jeopardy Clause as a bar to an appeal from a ruling in his favor. But since, in these circum-

stances, it is the defendant who has effectively (and unnecessarily) placed himself in jeopardy, he should be in no better position to invoke the Double Jeopardy Clause than a defendant who moves for a mistrial based on an event that ocurs at trial and over which he had no control. Such a motion, at least where delayed deliberately, would clearly be encompassed within the well-settled rule that "where circumstances develop not attributable to prosecutorial or judicial overreaching, a motion by the defendant for a mistrial is ordinarily assumed to remove any barrier to reprosecution." *United States* v. *Jorn*, *supra*, 400 U.S. at 485.[22]

Moreover, even if the Double Jeopardy Clause could be invoked in such a case, Congress, or this Court through its rulemaking power (18 U.S.C. 3771), could eliminate the problem about which the *Findley* court was concerned by providing that all legal claims and defenses that are known to the defendant prior to trial and are based upon undisputed facts *must* be raised prior to trial. A delay in asserting such a claim could either result in a waiver of the claim (see *Davis* v. *United States*, 411 U.S. 233) or a termination of the trial to permit an appeal by the United States if the trial judge rules in favor of the defendant. See *United States* v. *Moon*, 491 F.2d 1047 (C.A. 5). Under such circumstances,

[22] In fact, in *United States* v. *Jorn*, *supra*, 400 U.S. at 477, n. 6, the plurality opinion clearly intimated that the present Section 3731, which authorizes appeals from post-jeopardy dismissals, would "deal with the problem" raised by the court of appeals in *Findley*.

the "defendant's valued right to have his trial completed by a particular tribunal must * * * be subordinated to the public's interest in fair trials designed to end in just judgments." *Wade* v. *Hunter*, 336 U.S. 684. See also *Simmons* v. *United States*, 142 U.S. 148; *Thompson* v. *United States*, 155 U.S. 271; *Gori* v. *United States*, 367 U.S. 364; *Illinois* v. *Somerville*, 410 U.S. 458.

Accordingly, there are no legitimate considerations of policy—even assuming such considerations should affect the decision of this issue—that would justify depriving the United States of its right to appeal from pretrial orders dismissing indictments.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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